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Supreme Court, U.S.
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No.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

THEODORE B. GOULD,

Petitioner,

v.

FRED STANTON SMITH, as TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, and BANK OF NEW YORK,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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November, 1992

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QUESTIONS PRESENTED

Whether the invalidity of the creation of a liquidating trust for the fraudulent purpose of the avoidance of taxes and a bankruptcy court's appointment of a receiver under a confirmed plan's provisions may be shown in a collateral proceeding.

Whether the Constitution's Excessive Fines Clause prohibits a court's imposition of a coercive fine without consideration of the character and magnitude of the damage done by the continued contumacy.

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PETITION FOR WRIT OF CERTIORARI

Theodore B. Gould, appearing pro se, respectfully petitions for a writ of certiorari to review the judgment of the

United States Court of Appeals for the Eleventh Circuit in this case. The court of appeals affirmed the authority of the United States District Court for the Southern District of Florida to exercise its civil contempt power to impose a coercive fine of $1,000 per day for the petitioner's failure to comply with the order of a bankruptcy court of the same district to turn over $66,500, the proceeds from the sale of certain personal property in the petitioner's possession, to a liquidating trust created under the provisions of a confirmed plan of reorganization for the purpose of avoiding the payment of income taxes.

OPINIONS OF OTHER COURTS

The judgment of the court of appeals affirmed, without an opinion (App. at 1a), the district court's order. The order of

the district court (App. 11a) is unreported. The bankruptcy court entered a contempt order (App. 38a) and a separate order certifying contempt under Rule 9020, Bankruptcy Rules (App. 45a), both of which are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1992 (App. 1a), and a timely suggestion of rehearing in banc (which is treated by the Eleventh Circuit as a petition for rehearing as well, 11th Cir. Civ. R. 35-6) was denied on September 3, 1992 (App. at 3a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Section 105 of the Bankruptcy Reform Act of 1978, as amended, provides

in part:

11 U.S.C. Section 105. Power of court.

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.
(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

2. Section 1123 of the Bankruptcy Reform Act of 1978, as amended, provides in part:

11 U.S.C. Section 1123. Contents of Plan.

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall --

....

(5) provide adequate means for the plan's implementation such as

....

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee.

3. Section 1129 of the Bankruptcy Reform Act of 1978, as amended, provides in part:

> **11 U.S.C. Section 1129. Confirmation of Plan.**
>
> (a) The court shall confirm a plan only if all of the following requirements are met:
>
> (1) The plan complies with the applicable provisions of this title;
>
> ....
>
> (5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and
> (ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy.
>
> ....
>
> (11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of such debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

4. Section 401 of the Code of Crimes and Criminal Procedure [1988] provides in part:

> **18 U.S.C. Section 401. Power of Court.**
>
> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as --
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

5. Amendment VIII of the Constitution of the United States provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT

1. **The Bankruptcy Proceedings, the Liquidating Trust, and this Court's Judgment in** Holywell Corporation, et al. v. Smith, et al., 503 U.S. ____, 112 S.Ct. 1021, 117 L.Ed. 2d 196 (1992). -- This contempt case

is a result of the bankruptcy proceedings of the petitioner, the Miami Center Limited Partnership ("MCLP"), Chopin Associates ("Chopin"), Holywell Corporation ("Holywell"), and the Miami Center Corporation ("MCC"). Each of the debtors filed a separate voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Florida in response to foreclosure proceedings initiated by the Bank of New York ("BNY"), the construction lender for the development of the Miami Center, a mixed-use commercial real estate project in downtown Miami, Florida.

MCLP developed the Miami Center. Chopin owned the land underlying MCLP's development. MCC, a wholly-owned subsidiary of Holywell, and the petitioner were

general partners of MCLP and Chopin. Holywell was a limited partner of the debtor MCLP, and the parent stockholder of several solvent corporate subsidiaries[1], for no one of which proceedings were commenced by the filing with the bankruptcy court of petitions under a chapter of Title 11. The petitioner was also a limited partner of MCLP and at the commencement of the proceedings had partnership interests in several other entities[2] which owned property.

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[1] Holywell's nondebtor wholly-owned subsidiaries included Twin Development Corporation, Holywell Management of Washington, Inc., Orion Mechanical Services, Inc., Orion Cleaning Services of Washington, Inc., Whitehall Security Corporation, Holywell Leasing Company, and Holywell Telecommunications Company.

[2] On October 22, 1984, the bankruptcy court authorized Holywell and the petitioner, as stockholders and partners of the nondebtor entities, to consummate the sale of certain real and personal property in

On December 31, 1984, the bankruptcy court entered an order [C.P. No. 303], on BNY's emergency motion, to treat the proceeds of the sale of property ("Washington Proceeds")[3] as cash collateral, subject to the following conditions:

> (c) ...It will be necessary for Holywell to continue to provide these [administrative] services **until such time as the affairs of these companies, their partners and limited partners are terminated and all obligations to the Internal Revenue Service are determined and paid.** (Emphasis added)

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northern Virginia and Washington, D.C. ("Washington Properties"). These sales were concluded in December 1984 and January 1985.

[3] The Washington Proceeds included the following cash earned in the Commonwealth of Virginia and District of Columbia:

Twin Development	$13,128,533
Holywell Management	1,913,000
Orion Cleaning Services	719,210
Orion Mechanical Services	338,730
Whitehall Security Corporation	573,060
Holywell Corporation	12,303,870
Theodore B. Gould	4,331,157
	$33,307,560

The Bankruptcy Court's order modified a prior order requiring the segregation of the cash proceeds derived from the sale and the issuance of an accounting after distribution of the proceeds by Touche Ross & Co.[4] The petitioner's estate held partnership interests in each of the selling entities.

On August 8, 1985, the bankruptcy court confirmed, **without** conducting a hearing, an amended reorganization plan proposed by BNY on the debtors' behalf. BNY's plan provided, inter alia, for the creation of the Miami Center Liquidating Trust ("Liquidating Trust") and the post-confirmation appointment of a trustee, who

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[4] The report issued on January 25, 1985 noted that the "...distributions are before federal income tax liabilities, if any, related to these transactions [and] any income tax liabilities will be the responsibility of the individual partners."

was assigned possession of Holywell's property and the Washington Proceeds, see Holywell, slip. op., p. 2[5] The bankruptcy court, having held that BNY's claim was "undersecured," 54 Bankr. 41 (Bkrtcy. S.D. Fla. 1985) and that the bank faced a "substantial loss now," Id. at 43, denied the debtors' objections [C.P. No. 534] that the plan's provision which substantively consolidated Holywell's property with MCLP's estate was a scheme to avoid the payment of income taxes, that the disclosure statement of BNY's amended plan did not provide adequate information to satisfy the requirements of 11 U.S.C. § 1125, and that the plan was not feasible, since adequate means were not provided for its

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[5] "The plan required the debtors to give up their interests in Miami Center and the proceeds from the sale of the Washington Properties, but otherwise permitted them to remain in business."

implementation.

On August 12, 1985, the bankruptcy court entered an order appointing Fred Stanton Smith as trustee of the Liquidating Trust and authorized the trustee to "[e]ngage attorneys, accountants and such further consultants. . . for the purpose of analyzing the legal rights and financial position of the debtors and their respective subsidiaries." [C.P. No. 916][6] Thereafter, although the plan imposed a fiduciary duty on the trustee to manage

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6 The bankruptcy court has approved the following payments of fees and expenses to the trustee, his attorneys, and accountants:

Fred Stanton Smith (interim)	$ 126,625
Herbert Stettin, P.A. (interim)	444,753
Holland & Knight (final)	375,000
Wilmer, Cutler & Pickering (final)	163,000
Arthur Andersen & Co. (interim)	271,830
Total	$1,381,208

the property in his custody "in all other ways as would be lawful for any person owning the same to deal therewith...,"[7] the trustee sought and obtained indemnification from BNY. The indemnification was granted prior to commencement of distribution under the plan, for the trustee's actions regarding the Miami Center's sale. The trustee was to be held personally harmless "for payment of unpaid taxes, i.e., Internal Revenue Service claims, which would result from the sale and transfer of the property at the closing...." Answers of Wolff to Interrogatories.[8]

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[7] See Art. V, 3(w); also In re Holywell Corp., 911 F.2d 1539, 1547 (11th Cir. 1990)

[8] On May 15, 1987, the original presiding bankruptcy judge held an ex parte conference with the trustee and Mr. Wolff, (then a partner of Holland & Knight), at which Mr. Wolff was dismissed as the

The trustee also sought and obtained indemnification for his actions in implementing the plan's provisions, wherein he allowed BNY to take a credit of $27,050,115 for postpetition interest on its undersecured claim and thereafter disbursed the cash of Holywell, and its nondebtor subsidiaries, to pay the unsecured claims of general creditors against MCLP, without first establishing a reserve for the payment of taxes on the income attributable to the property of the corporations in his custody.

On January 29, 1986, the bankruptcy court amended its Confirmation Order nunc pro tunc, adopting verbatim the factual

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trustee's attorney, because "...Mr. Wolff feels that the confirmation order was erroneous, it should not have been entered, that the plan...is defective." Transcript, p. 3.

findings proposed by BNY as the prevailing party,[9] including the following relevant conclusions of law:

> 62....Because of controlling provisions of Florida law relating to creditors' rights, substantive consolidation under the Bank's plan here does little more than to adopt and implement state law. For example: (a) In due course, a creditor of MCLP could reach (i) Gould's assets (because of his liability as a general partner),...(iii) Holywell's assets (**net of its liabilities**), by **levying upon Gould's ownership of 100% of the stock of Holywell....** (Emphasis added)
>
> 66....There has been no evidence to substantiate the debtors' claim that substantive consolidation will somehow cost them "approximately $17 million in Federal income taxes." [C.P. No. 580, p. 2]

The district court affirmed the confirmation order.[10] The Eleventh Circuit

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9 Miami Center Limited Partnership v. Bank of New York, 838 F.2d 1547, 1551, n. 4 (11th Cir.), cert. denied, 488 U.S. 823 (1988)

10 See Holywell Corp. v. Bank of New York, 59 Bankr. 340, 353 (S.D. Fla. 1986).

subsequently vacated the district court's order and dismissed the debtors' appeal of the confirmation as moot because the plan had been substantially consummated and effective relief could not be granted.[11]

On April 28, 1988, the bankruptcy court granted declaratory relief to the trustee from the statutory obligation to file or pay income taxes related to the plan's implementation, having previously

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[11] Having granted deference under the "clearly erroneous" standard to the bankruptcy court's adoption of BNY's proposed findings of fact, citing Anderson v. Bessemer City, 470 U.S. 564 (1985), the Eleventh Circuit held in part:

> The bankruptcy court did not err in finding, and the district court did not err in affirming, that the plan had been substantially consummated, and that its fairness, feasibility, and propriety had been verified.... Miami Center, 838 F.2d at 1557.

instructed Herbert Stettin, the attorney who had replaced Irving M. Wolff, Esq., to draw the court's order.[12]

The trustee's attorney drafted the court's order, without circulating the proposed draft to opposing counsel and after engaging in ex parte communication bankruptcy court,[13] in which it was held

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12 On April 11, 1988, the bankruptcy judge in Smith v. United States, et al., informed the parties of the court's decision and held as follows:

> ...By virtue of the fact that this is a declaratory [judgment] on behalf of the Trustee, I am making no decision on liability on behalf of the Bank of New York, Gould, or Holywell....

13 The degree to which the judicial process was abused by the bankruptcy judge's ex parte communication with the trustee's attorney is illustrated by the court's adoption of the factual finding that the separate plans filed on behalf of Holywell and the petitioner's estate did not "... provide[d] for the payment for federal income taxes, if any, due on the gain realized from..." the sale of the Washington Properties and the Miami Center. In

that the Liquidating Trust was a grantor trust and the debtors were liable for payment of the taxes as grantors of a trust.[14]

Although the district court affirmed the bankruptcy court's declaratory judgment, this Court reversed the Eleventh Circuit's divided opinion that the trustee

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fact, Holywell's plan estimated that taxes in the amount of $15,000,000 would be payable with a priority superior to the distribution to unsecured creditors, and the plan filed on the petitioner's behalf estimated taxes of $7,290,000 would be payable in liquidation of the estate's various partnership interests.

14 The bankruptcy court's judgment concluded in part:

> The relief sought by the debtors and the government would require the complete dismantling of the substantially consummated plan...A modification would require the liquidating trustee to recover millions of dollars already paid to creditors for redistribution on a pro rata basis. 85 Bankr. 898, 903 (Bankr. S.D. Fla. 1988)

did not breach his duty under the terms of the plan or other statutory provisions.[15]

This Court held in part:

> We conclude in this case that the trustee must pay the tax due on the income attributable to the corporate debtors' property because Section 6012(b)(3) requires him to make a return as the "assignee" of the "property...of a corporation." We further hold that the trustee must pay the tax due on the income attributable to the individual debtor's property because Section 6012(b)(4) requires him to make a return as the "fiduciary" of a "trust." Holywell, slip op., p. 3.

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[15] The Eleventh Circuit had previously affirmed, without argument and issuance of a written opinion, In re Holywell Corporation, No. 88-6187, July 7, 1989, cert. denied, ___ U.S. 1990, the district court's judgment, 93 B.R. 780 (S.D. Fla. 1988), affirming the bankruptcy court's dismissal of an adversary complaint alleging that the trustee breached his fiduciary duty and was negligent, inter alia, in (1) granting BNY a credit of $27,050,115 in postpetition interest on its undersecured claim against MCLP's estate and (2) the failure to establish a reserve for the payment of income taxes prior to the use of the cash of Holywell, and its subsidiaries, to pay claims against MCLP.

2. This Contempt Proceeding -- The trustee's motion for contempt and other relief (App. at 48a), sought an order certifying that the petitioner was in contempt of the bankruptcy court's "Order of Confirmation and the provisions of Section 1142 of the Bankruptcy Code," (App. at 55a) for refusing to turn over the proceeds of the sale of the concrete pumps on June 2, 1989. The petitioner conveyed title and possession to the buyer. The trustee did not assert that he had the authority to convey title.[16]

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[16] The trustee testified under oath in the tax case that his duties and control of the property of the estates in his custody were limited to the functions of a disbursing agent and a "contract trustee":

MR. STETTIN: "...do you have any other control of any other property other than money of the consolidated debtors?"

MR. SMITH: "No, I do not...."

On August 1, 1989, the bankruptcy court entered a Contempt Order against the petitioner, drafted by the trustee's attorney and submitted in an ex parte communication with the bankrupcy judge,[17] in which the petitioner was directed to turn over the sale proceeds to the trustee no later than July 31, 1989 (App. at 41a).

At the hearing on July 27, 1989, the petitioner informed the court that the

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MR. STETTIN: "Have you done anything except hold title to the money and determine the validity, priority and amount of the claims against the consolidated debtors?"

MR. SMITH: "That's all I have done." Transcript, February 11, 1988, p. 87.

[17] The bankruptcy court's ex parte communication with its agents and attorneys as a common practice, is a violation of **Rule 9003, Bankruptcy Rules**, and **Canon 3A(4)** of the **Code of Judicial Conduct**: "A judge should...neither initiate nor consider ex parte communications concernig a pending or impending proceeding."

sale proceeds would not be paid to the trustee, since the trust had been formed for the unlawful purpose of avoiding the payment of taxes and complying with the court's order would cause the case to be moot.[18]

The court imposed a coercive fine of $1,000 for each day from and including August 1, 1989, payable into the court registry, until $66,500 plus interest was paid to the trustee (App. at 41a).

On August 14, 1989, the bankruptcy court entered an order certifying the petitioner to be in contempt under Rule 9020(a) and (b) of the Rules of Bankruptcy Procedure for failure to comply with its

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[18] In re Cordova Gonzalez, 726 F.2d 16, 21 (1st Cir. 1984), cert denied, 466 U.S. 951

prior order. (App. at 45a) The petitioner filed timely objections to the order of contempt (App. at 57a).

The petitioner's objections stated, inter alia, that the bankruptcy court lacked the statutory authority to appoint a trustee granted the powers of a receiver and vested with title to the individual debtor's bankruptcy estate, while relieving such a trustee of the duty to discharge requirements of law, specifically, the payment of federal and state income taxes, that the creation of the Liquidating Trust was for the unlawful purpose of avoiding the payment of taxes, that an unlawful contract is not enforceable, and that the value or sale proceeds of the concrete pumps was not enumerated as an asset required for the implementation of the Bank's plan.

On May 17, 1991, the district court entered its contempt order, and imposed a coercive daily fine of $1,000 payable to the court registry for failure to comply with its order to turn over the sale proceeds of the concrete pumps to the trustee. (App. at 26a)

The court of appeals affirmed, without an opinion concerning the invalidity of the creation of a trust to avoid taxes, having treated the mandate of this Court's Holywell judgment as "water over the dam," 11th Cir., Transcript, June 23, 1992,[19] and without consideration of this Court's

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[19] This Court's mandate was issued as of February 25, 1992, and directed the Eleventh Circuit to remand the cause for hearings in conformity with its Holywell opinion. The Eleventh Circuit remanded the case to the district court on July 8, 1992, and its mandate issued on August 7, 1992. The district court has not scheduled the remanded hearings.

precedent limiting a court's discretion to impose a fine to coerce compliance with its orders.

REASONS FOR GRANTING THE WRIT

An important consideration in this case is the degree to which the public interest would have been damaged if the petitioner had not used the cash, which the district court's contempt order required that petitioner turn over to the trustee, to pay attorneys' fees related to filing a petition for writ of certiorari in the appeal of the Eleventh Circuit's tax opinion. The case would have been closed. The Bank's scheme to avoid taxes would have been successful, and the unpaid taxes would have been uncollectible.[20]

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[20] A precedent would have been established which the Solicitor General has described in the following terms:

The Eleventh Circuit's mootness doctrine would have disposed of questions related to the tax effects of the Bank's plan and the plan's feasibility.[21] The Miami

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> The decision of the court of appeals creates a tax loophole of troubling proportions. It would allow a liquidating trustee to be appointed in a case under Title 11, take title to the debtor's assets, invest or dispose of those assets in a manner that realizes taxable income, but neither report nor pay the taxes owed on that income. **Brief For The United States,** p. 13.

In fact, prior to the issuance of this Court's Holywell opinion, it was a common practice for bankruptcy judges to confirm plans which did not provide for the payment of income taxes arising from the sale of the estate's property, and, since the Bankruptcy Code relieves a trustee appointed in a case under title 11 of personal liability for the taxes, penalties and interest, 11 U.S.C. § 1106(a)(6), when the case is closed, the Internal Revenue Service has no legal means of collecting the taxes.

[21] "We...conclude that the allegation concerning the propriety of the bankruptcy court's approval of a plan which makes no express provision for income taxes is an attempt to alter or modify the Plan and is

Center mootness doctrine would also have disposed of questions concerning the Bank's scheme to defraud the United States.[22]

The district court's order was entered prior to the issuance of this Court's opinion in Holywell, reversing the court of appeals' judgment, in which it was held that the liquidating trustee did

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therefore barred." In re Holywell Corp., 911 F.2d at 1543.

[22] "In dismissing the debtors' previous challenge, this court was guided by the important policy of bankruptcy law that court-approved reorganization plans be able to go forward based on court approval unless a stay is obtained. Miami Center Limited Partnership, 838 F.2d at 1555. Mindful of that policy, we will not entertain any challenge to the Plan which seeks to modify or amend its provisions.

The district court is correct in the ruling that the allegation of fraud is an attempt to modify or alter the Plan and is therefore barred under the mootness doctrine." Id.

not "...breach his duty under the terms of the Plan or other statutory provision...to file income tax returns or pay taxes," 911 F.2d at 1546.[23]

In Holywell, this Court agreed with the petitioner that, as the assignee of the corporation's property, the trustee must file its returns and pay the taxes on income attributable to the corporation's property, and further that "the trustee must file a return because he is the fiduciary of a trust of an individual," slip op, p. 6. This Court also concluded that

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[23] The court of appeals also concluded pertinent to this case:

> Our conclusion does not leave the government without the ability to collect taxes on the post-confirmation sale of property. It simply means that the reorganized debtor, not the liquidating trustee is responsible for such taxes. Id. at 1545.

"The trustee...is not acting as the fiduciary of Gould's bankruptcy estate," id. at p. 7, and held that Smith acted as the fiduciary of a trust, id., quoting the Treasury Regulations defining the term "fiduciary" used in 26 U.S.C. § 7701(A)(6).[24]

The court of appeals' decision affirming the district court's authority to exercise its contempt power has sanctioned breach of fiduciary duty, negligence, and unlawful actions of a

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[24] "'Fiduciary' is a term which applies to persons who occupy positions of peculiar confidence toward others, such as trustees, executors, and administrators. A fiduciary is a person who holds in trust an estate to which another has the beneficial title or in which another has a beneficial interest, or receives and controls income of another, as in the case of receivers. 26 CFR Section 301, 7701-6. Id. at slip op., pp. 7-8.

federally-appointed officer.[25] The consequence of this Court's opinion in Holywell require the conclusion that the

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[25] See King v. United States, 379 U.S. 329, 337 (1964) paraphrasing Bramwell v. United States Fidelity & Guaranty Co., 269 U.S. 483, 488 (1926) citing Beaston v. Farmers' Bank, 37 U.S. (12 Pet.) 102 (1838). The manner in which the Absolute Priority Statute operates has been described apart from the inapplicable exception in this case for the Bankruptcy Code, as follows:

> From the language employed in this section, and the construction given to it, from time to time, by this Court, these rules are clearly established: first, that no lien is created by the statute: secondly, the priority established can never attach while the debtor continues the owner and in the possession of the property, although he may be unable to pay all his debts: thirdly, no evidence can be received of the insolvency of the debtor, until he has been divested of his property in one of the modes stated in the section: and fourthly, whenever he is thus divested of his property, the person who becomes invested with the title, is thereby made a trustee for the United States, and is bound to pay their debt first out of the proceeds of the debtor's property. 37 U.S. (12 Pet.) at 133-134).

bankruptcy court lacked authority to confirm the Bank's amended plan, and "neither the approval or the confirmation of [such] a plan can stand." Protective Committee v. Anderson, 390 U.S. 414, 435,441 (1967). The Bank's plan is not feasible,[26] and the bankruptcy court did not "...assure itself reorganization will succeed, Section 1129(a)(11), and therefore that the IRS, in all likelihood, will collect the tax owed." United States v. Energy Resources

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[26] The trustee's attorney conceded in the tax case before this Court that the Bank's plan is not feasible:

QUESTION: No, but I'm still asking you, supposing they had acted with due diligence, what would have happened?

MR. STETTIN: The plan would not have been confirmable because one of the requirements under section 1129 is that the plan be shown to be capable of successfully being carried out.

Supreme Court, Holywell, Transcript, p. 23.

Co., 110 S.Ct. 2139, 2142 (1990).[27] More-

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[27] The burden of proof concerning a determination of the plan's future tax effects was on the Bank as the plan's proponent, "in the preparation and judicial approval of [the] reorganization plan...by which the fairness and feasibility of the plan [could] be ascertained," W. T. Plumb, The Tax Recommendations of the Commission on the Bankruptcy Laws - Tax Procedures, 99 HARV.L.REV. 1360, 1467 (1975). However, the Bank did not request that the bankruptcy court estimate the amount of the tax liabilities arising from the plan's implementation and did not seek a private ruling from the IRS for a declaration of the tax effects of its amended plan prior to confirmation. See S. Rep., No. 1106, 95th Cong., 2d Sess 28 1978). Instead, the Bank's position was that the IRS had not protected the interests of the United States and its pleading before this Court stated, in relevant part, as follows:

> Having failed to exercise the requisite diligence in bankruptcy court, the IRS now advances a strained statutory argument in an effort to collect the debtors' taxes from **funds that the plan of reorganization explicitly reserves for other creditors....** [T]he IRS should not be permitted to absent itself from the negotiating table and then demand a form of super-priority payment after the plan has been confirmed. Id. at pp. 11-12. (Emphasis added) **Brief In Opposition Of Respondent The Bank of New York**, pp. 11-12.

over, the Bank's plan did not comply with 11 U.S.C. § 1129(a)(1), namely § 1122, and did not satisfy the Fair and Equitable Standard. In re Holywell Corp. (Miami Center Joint Venture v. Bank of New York), 913 F.2d 873, 879-88) (11th Cir. 1990).

The court of appeals has adopted a common law mootness standard without constitutional or statutory authority to dismiss the debtors' appeal of the bankruptcy court's confirmation order, Miami Center, 838 F.2d at 1553;[28] a plan has

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[28] The court of appeals has relied on the Miami Center mootness doctrine to dismiss the debtor MCLP's right to recover postpetition interest of $27,050,115 which the trustee allowed the Bank to take as a credit, having sought and obtained indemnification for his conduct, because "the credit is now lawful in the sense that it is an integral component of the confirmed Plan...." In re Holywell Corp., (Miami Center Limited Partnership v. Smith), No. 88-151-Civ-Aronovitz (S.D. Fla., July 21, 1988), appeal dismissed, No. 88-5770 (11th

been implemented which does not satisfy the requirements of the Fair and Equitable Standard;[29] and the court's contempt power

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Cir., January 9, 1991), cert. denied, ___ U.S. ___ (1991).

The court of appeals also used the Miami Center mootness doctrine to deny MCLP's right to recover an estimated $8.7 million in interest which the Bank unilaterally determined to be payable under the contract documents. The Eleventh Circuit held in part:

> It might be true that the notes called for a lower interest rate than that accepted by the bankruptcy court.... Altering the amount of interest would change the amount of the judgment lien, which in turn would modify the terms of the sale to the Bank, to which the Bank agreed....This would strike at a crucial element of the reorganization plan....The amount of interest...was included in the Bank's bargain for the purchase of the project, which constituted a large part of the confirmed plan.

In re Holywell Corp. (Miami Center Limited Partnership v. Bank of New York), 901 F.2d 931, 933 (11th Cir. 1990), cert. denied, 111 S.Ct. 713 (1991).

29 See United States v. Key, 90 S.Ct. 1049 (1970): "This court has long held that ...the words 'fair and equitable'...in no

has been used to deter petitioner from raising in collateral proceedings the issue of the trustee's personal liability for breach of fiduciary duty related to the failure to pay taxes and commingling the accounting of the estates in his custody.

1. The Invalidity of the Bankruptcy Court's Appointment of a Receiver is a Jurisdictional Issue Which May Be Shown in a Collateral Proceeding -- This Court has held that there are certain strictly jurisdictional facts "...the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity," Noble v. Union River Logging Railroad Co., 147 U.S.

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way authorize a district court to evade priorities otherwise granted by law...and it ...cannot be taken to exclude by implication an explicit statutory priority, such as that granted to the United States." 90 S.Ct. at 1052.

165, 173 (1892), and cited Griffith v. Frazier, 8 Cranch 9, 23 (1814) for the principle that if a court lacked authority to appoint an officer of the court to administer an individual's estate, then the judgment of the court must fail for want of jurisdiction and its invalidity may be shown in a collateral proceeding. In such a case, Griffith held that the court's appointment is void ab initio and all of the trustee's acts as the court's agent are also void. 8 Cranch at 27.

The plain language of 11 U.S.C. § 105(b) limits the power of a court in a bankruptcy proceeding and specifically prohibits the appointment of a receiver in a case under title 11. As the Seventh Circuit Court of Appeals held in a pertinent discussion of Section 105(b):

> As the legislative history explains, "the bankruptcy code has ample provision for the appointment of a trustee [i.e., under Section 1104] when needed. Appointment of a receiver would simply circumvent the established procedures."

In re Memorial Estates, Inc., 797 F.2d 516, 519 (1986).[30]

As the plan's proponent, and a party in interest, the Bank could have requested the appointment of a trustee in a case under title 11 at any time after commencement of the case, but before confirmation of the plan, in accordance with the Best Interests Standard defined in 11 U.S.C. § 1104(a)(2). The duties of such a trustee would have included filing tax returns required by law in accordance with 11

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[30] See also Notes of Committee on the Judiciary, Senate Report No. 95-989: "...the bankrutpcy judge is prohibited from appointing a receiver in a case under title 11 under any circumstances...."

U.S.C. § 1106(a)(6). No question would have arisen about whether the liquidating trustee was required to file the returns as a fiduciary under 26 U.S.C. § 6012(b).

The intent of Congress in limiting a bankruptcy judge's authority to appoint a receiver was to remove the court from the criticized practice under the pre-Code Bankruptcy Act of appointing an officer that would appear in litigation before the court against an adverse party.[31]

In Spring Valley Water Co. v. San Francisco, 246 U.S. 391, 395 (1918), this Court defined the term "receiver" as "...embracing any person acting as [an] agent or depository of funds for a court."

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[31] Subsection (c) of 11 U.S.C. § 1104 grants authority to the United States trustee to select and appoint a trustee or examiner which a court has ordered to be appointed.

Although this Court's Holywell opinion does not resolve the question of whether the trustee appointed under the provisions of the Bank's plan is a receiver, if the trustee is entitled to receive and hold the income from the sale of the concrete pumps, acting on behalf of an estate of which the petitioner is the beneficial owner, then the trustee must be deemed a receiver under this Court's Spring Valley definition and under the common usage of the term as defined in Black's Law Dictionary, Vol. v, p. 1140.[32]

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[32] A "receiver" is defined, in relevant part, as follows:

> A ministerial officer, agent, creature, hand, or arm of, and a temporary occupant and caretaker of the property for the court, and he represents the court appointing him, and he is the medium through which the court acts.... He is a trustee or ministerial officer representing court, and all parties in interest in litigation, and property or fund entrusted to him."

This Court's Holywell opinion concludes that the Bank's plan "created a separate and distinct trust holding the property of the estate and gave the trustee control of this property" in accordance with 11 U.S.C. § 1123(a)(5)(B), slip op, p. 7. However, the question of whether "the Bankruptcy Code permits a plan to place a new fiduciary in charge of an estate after confirmation," slip op., p. 6, was not resolved.

The resolution of this question is the threshold jurisdictional issue in this contempt case. The district court's conclusion that "Article V of the plan... provides specifically for the appointment of a trustee of the Miami Center Liquidating Trust to implement the plan" (App. at 11a) does not resolve the question of whether the bankruptcy court had

statutory authority to appoint a receiver under the provisions of a creditor's liquidating plan and to force the debtor to engage in unlawful conduct and cooperate with such an agent in compliance with the plan. (App. at 10a)

Various courts have held that "while not expressly recognized by the Code, a liquidation agent named by the plan proponent, with duties and manner of compensation set out in the plan, is an appropriate party to effectuate a liquidation plan."[33] In Jorgensen, the BAP of the

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[33] See In re Schultz, 69 B.R. 629, 631 (D.S.D. 1987), citing In re Jorgensen, 66 B.R. 104, 108 (9th Cir. BAP 1986):

> A liquidating and disbursing agent named in the liquidating plan is an appropriate entity for carrying out a liquidating plan....Several Code sections support a bankruptcy court's power to appoint or approve a

Ninth Circuit defined the authority of such a liquidation agent as follows:

> The appointment of the liquidating and disbursing agent is consistent with Section 1123(b)(5). Traditionally, courts have appointed agents to make disbursements pursuant to plans, the function of a trustee with limited powers. Here, the property of the estate does not vest in the debtors until such time as all claims are paid in full. 66 B.R. at 108.

The problems arising from avoiding the statutory prohibition on a court's authority to appoint a receiver by referring to the court's officer as a "liquidating and disbursing agent" have been illustrated in this case. See In re

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> liquidating agent. See 11 U.S.C. Section 105(a), 327(a), 1123(b)(5).... Any actions taken by such an agent can be enforced by the bankruptcy court...."

See also In re Rolling Green Country Club, 26 B.R. 729 (Bkrtcy. D. Minn. 1982); In re Sonner, 53 B.R. 859 (Bkrtcy. E.D. Va. 1985); In re Chase & Sanborn, 58 B.R. 721 (Bkrtcy. S.D. Fla. 1986); In re Southern Industrial Banking, 71 B.R. 351 (Bkrtcy. E.D. Tenn. 1987)

Holywell Corp., 911 F.2d at 1546.[34] The Eleventh Circuit concluded that "...neither the provisions of the Plan nor the statutory provisions obligate the liquidating trustee to file income tax returns or pay taxes," Id., having relied upon the following pertinent analysis:

> In deciding whether to extend the provisions of section 6012, we find In re Allen Wood Steel Co., 7 B.R. 697 (Bkrtcy. E.D. Pa. 1980) instructive. In In re Allen Wood Steel Co., the bankruptcy court refused to extend the provisions of section 6012 to a disbursing agent under facts similar to this case. We agree with the district court that section 6012 does not apply to a liquidating trustee and rely on its analysis...."

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[34] The majority opinion of the Eleventh Circuit held, in relevant part, as follows: "First, we conclude that the liquidating trustee is not a trustee under Title 11, but rather a contract trustee performing limited and essentially ministerial duties. Second, we agree that the liquidating trustee's non-discretionary duties of distributing the trust property in accordance with the Plan makes him similar to a disbursing agent rather han an assignee or fiduciary." 911 F.2d at 1546.

In Bull v. United States, 295 U.S. 249, 260 (1935), this Court held that taxes are the "life-blood" of government. However, more than seven years have elapsed since the bankruptcy court confirmed the Bank's amended plan and the trustee took possession of substantially all of the property of the debtors' estates.[35] Nevertheless, federal and state income taxes have not been paid.[36]

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[35] The trustee took possession of assets with a fair market value of $338,123,076 as of October 10, 1985, including cash and securities in the amount of $37,488,326, the right to repayment of certain super-priority loans authorized by the bankruptcy court in the amount of $4,827,937. The trustee has also received postconfirmation income on behalf of Holywell and the petitioner's estate in the amount of $19,605,219 in interest, judgments and partnership distributions as of June 30, 1992.

[36] The IRS Final Report, issued on July 13, 1992, to Fred Stanton Smith, as assignee of Holywell Corporation's property, has assessed corporate income taxes of $20,695,806 plus penalties for negligence

Notwithstanding that the intent of Congress in enacting the injunctive provisions of the predecessor of 11 U.S.C. § 524(a)(2) was to stop the abuses arising from the commencement of lawsuits against debtors[37] "who were unable to obtain counsel because bankruptcy had stripped them

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and late payment in the amount of $5,975,648. (App. 116a)

The Commonwealth of Virginia has issued a Final Assessment for taxes, penalties, and interest in the amount of $3,791,098.84 as of July 31, 1992.

As of July 31, 1992, the trustee had misappropriated $18,710,000 in cash of Holywell and its subsidiaries to pay claims against MCLP's estate (App. at 124a).

[37] The trustee has filed various lawsuits against Holywell and the petitioner to determine his rights and protect himself from lawsuits alleging breach of fiduciary duty and negligence in the management of the property in his fiduciary custody, namely, (a) failure to establish a reserve and pay federal and state income taxes; (b) allowing the Bank to take a credit of $27,050,115 in postpetition interest on its undersecured claim; (c) conveying the property without consideration and failure to collect the accounts receivable of HTC and HLC in the amount of $11,932,793 as of

of their assets," Brown v. Felsen, 442 U.S. 127, 135 (1979), the petitioner has been forced to borrow funds and incur substantial liabilities to pay attorneys' fees to defeat the Bank's scheme to avoid the payment of taxes and to pay accounting expenses to segregate the assets and liabilities which the trustee and his accountants commingled.[38] (App. at 124a)

The legislative history of the Bankruptcy Code reflects the public policy

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October 10, 1985; and (d) misappropriation of the cash of Holywell, and its nondebtor subsidiaries, engaged in business in Virginia and the District of Columbia, to pay claims against MCLP without first paying their income tax liabilities.

[38] The trustee's conduct in these proceedings should be compared with the general rule that a trustee in his administration of a trust is under the duty of acting exclusively and solely in the interest of the trust estate or the benficiaries, within the terms of the trust, and is not to act in his own interest or in the interest of a third person. 76 AM Jur 2d Trusts Section 316

that the bankruptcy laws should not be applied in a manner to avoid taxes:

> [T]ax collection rules for bankruptcy cases have a direct impact on the integrity of the Federal, State and local tax systems. These tax systems generally based on voluntary assessment, work to the extent that the majority of taxpayers think they are fair. This presumption of fairness is an asset which should be protected and not jeopardized by permitting taxpayers to use bankruptcy as a means of improperly avoiding their tax debts. To the extent that debtors in a bankruptcy are freed from paying their tax liabilities, the burden of making up the revenues thus lost must be shifted to other taxpayers.[39]

11 U.S.C. § 1123(a)(7) prohibits the appointment of a trustee under the provisions of a plan in a manner which is inconsistent with public policy. Furthermore, the authority of a court to confirm a plan is limited by the enumerated requirements of § 1129(a) and specifically

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39 S.Rep. No. 989, 95th Cong., 2d Sess. 13-15 (1978)

requires that the appointment of a trustee or any successor to the debtor is consistent with public policy, Section 1129(a)(5)(A).

This Court has made the test of a plan's feasibility the principal determinant limiting a bankruptcy court's jurisdiction in tax matters. As previously explained, the determination of a plan's feasibility imposes a duty upon a bankruptcy court to assure itself that the future tax effects of a plan will be satisfied, the tax collector paid, and that the debtor will have a "fresh start."

In this case, the bankruptcy court concluded that "The payment of federal income taxes would, of necessity, be an impermissible modification of the confirmed plan,"85 B.R. at 903, because the

court construed the provisions of the Bank's plan under which the Liquidating Trust was created and a trustee appointed as relieving the trustee of the duty to pay income taxes.

2. A Court Will Not Enforce a Contract Made to Defraud the Law and a Trust Created for the Fraudulent Purpose of Avoiding Taxes is Unlawful -- The degree to which the proceedings have departed from the judicial standard is illustrated by the court of appeals' affirmance of the district court's exercise of its contempt power based on concluding that the Bank's plan is a binding contract (App. at 19a) and that the trustee's refusal to pay income taxes was not relevant. (App. at 20a)

This Court's historical precedent precludes a court from enforcing a con-

tract entered in fraud of a law of the United States. A contract made contrary to law is an act in fraudem legis, and in Hannay v. Eve, 3 Cranch 241 (1856), Chief Justice Marshall's opinion stated, in relevant part, as follows:

> [A] contract being clearly in fraud of the law...a law to which, under the circumstances attending to it, no just exceptions can be taken, its execution cannot be compelled by the courts of that country to evade whose laws it was made. 3 Cranch at 247.

This fundamental rule was restated in Craig v. State of Missouri, 41 Peters 408, 436 (1830) and Bank of the United States v. Owens, 27 U.S. 527, 538 (1829)[40] Similarly, this Court held in United States v. Mississippi Valley Generating Co., 364 U.S. 520, 563 (1961), that "a statute

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[40] "Courts are instituted to carry into effect the laws of a country, how can they become auxillary to the consummation of violations of law?" 27 U.S. at 538

frequently implies that a contract is not to be enforced when it arises out of circumstances that lead enforcement to offend the essential purpose of the enactment."

It is also a fundamental rule that a court will not sanction conduct or enforce contracts injurious to the state and public interest. The Restatement of Trusts provides in Section 63(1) that a trust is invalid if the purpose of the settlor in creating the trust is to defraud creditors, and Scott on Trusts states that where a trust is made to avoid taxes or otherwise to defraud the government, the trust is unlawful and will fail.[41]

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[41] BNY has stated that "Even a cursory review of these documents [i.e., the Bank's plan and disclosure statement] would have revealed that no provisions were included in the plans for payment by the Liquidating Trust of any taxes resulting from the disposition of the debtors'

the rationale for creation of a liquidatng trust as follows:

> The IRS's own Revenue Ruling indicates that the Liquidating Trust, even if determined to be liable for taxes, would not have been liable for any federal income taxes relating to the Miami Center project since its basis in any property was equal to its sale price. Rev. Ruling 63-228, 1963-2 Cum. Bull. 229.....In that Ruling, assets were transferred from a bankrupt's estate to a trust established for the benefit of creditors. The Ruling viewed the transfer to be a transfer in satisfaction of the creditors' claims. Since the Trust took the Miami Center Project for the benefit of creditors at its fair market value and simultaneously disposed of it at the same time, no gain was realized by the Liquidating Trust in any event. Id. at 23.

BNY also explained that "...the Liquidating Trust is a grantor trust for federal income tax purposes [and] ... is not subject to tax; however, the grantors, i.e., the Debtors, may be subject to tax on

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property," 11th Cir., Answer Brief, Smith v. United States, et al., p. 25.

their income."[42] The trustee adopted this position and stated:

> The Miami Center Liquidating Trust is a grantor trust as defined under subpart E of subchapter J of the Internal Revenue Code, 26 U.S.C. Sections 671-79. The trust thus has no responsibility to pay the Debtors' taxes. The beneficial owners of the trust, the Debtors in this Chapter 11 proceeding, are taxed separately.

Notwithstanding the conflict with the precedent of the Ninth Circuit in Richardson v. The United States of America, 552 F.2d 291 (9th Cir. 1977) and De Pinto v. United States of America, 585 F.2d 405 (9th Cir. 1978), the courts below sanctioned this injurious policy, although the Ninth Circuit held that the filing of a petition in bankruptcy is not a donative act of the settlor of a trust.

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[42] S.D. Fla., Consolidated Answer Brief, Smith v. United States, et al., p. 15.

This Court has held that the facts in In re Sonner, 53 B.R. 859 (E.D. Va. 1985), which applied the grantor trust provisions to a liquidating trust created under the provisions of a confirmed plan, were distinguishable from this case. Holywell, slip op., p. 8. However, satisfying the public interest in the administration of the tax and bankruptcy laws requires eliminating the degree to to which the creative genius of attorneys may use the technical considerations of the law of trusts to avoid the payment of taxes.[43]

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[43] It has been estimated that approximately 20 to 30 percent of Chapter 11 cases are liquidations. Recent Chapter 11 cases involving a "liquidating trust" have included Toren v. Braniff, Inc., 893 F.2d 763, 765 (5th Cir. 1990); In re Goldblatt Bros., 106 Bankr. 522 (Bankr. N.D. Ill. 1989); In re Highway Equip. Co., 120 Bankr. 910, 911 (Bankr. S.D. Ohio 1990); In re Crowthers McCall Patterns, Inc., 120 Bankr. 279, 283 (Bankr. S.D. N.Y. 1990); In re Mako, Inc., 120 Bankr. 198, 200 (Bankr. E.D. Okla. 1990); In re Mortgage

The Bankruptcy Code provides for liquidation under Chapter 7. Allowing the creation of a liquidating trust as a grantor trust under a liquidating plan proposed in Chapter 11, in which all of the assets of a debtor's estate are vested in a liquidating trust, defeats the priority for the distribution in liquidation of the property of a debtor's estate in accordance with 11 U.S.C. Section 726.

In this case, absent the creation of the Liquidating Trust and substantive consolidation of the debtors' estates,

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Inv. Co., 111 Bankr. 604, 609 (Bankr. W.D. Tex. 1990). The bankruptcy court's opinion in Sonner illustrates the degree to which the public interest has been damaged ("Courts which have determined that a [liquidating] trustee may not be taxed pursuant to section 960 have held the tax to be an impermissible burden upon the liquidation process." 53 B.R. at 866)

based on the petitioner's ownership of Holywell's capital stock,[44] to create a "common pool of assets to pay all claims" (App. at 124a), the distribution of the proceeds from the sale of all of the property of the estates of Chopin and MCLP in liquidation would have caused the principal amount of MCLP's unsecured creditors

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[44] The bankruptcy judge explained the consolidation of the debtors' estates as follows:

> ...the predicate for the assertion that the assets of Holywell properly are subject to the claims of the other entities is the link through Gould. If Gould, in fact, controls, and I assume tha the word "controls" also is "owns," I mean "own and controls," has the power to dispose of the assets of Holywell and if he simultaneously, in the same capacity, is indebted to those other entities, isn't that the same thing as saying that Holywell is indebted to those others.

During the substantive consolidation hearing, the bankruptcy court acknowledged that "...there might be adverse tax consequences..." as a result of implementation of BNY's Plan.

to be paid prior to payment of the Bank's postpetition interest, which would have had a priority superior only to MCLP's equity. Holywell and its subsidiaries would have had adequate cash to pay their federal and state income taxes.

Instead the Liquidating Trust's creation as a separate taxable entity, and the treatment of the transfer of the assets of the individual debtor's estate as a sale in exchange for the discharge of indebtedness, failed to preserve the NOLs as property of the petitioner's estate and has caused the imposition of an alternative minimum tax of $1,147,545 on the individual debtor's bankrutpcy estate. Furthermore, the failure to preserve the estate's partnership interest in the Miami Center Joint Venture's NOLs has caused an additional tax burden of an estimated

$2,150,000 payable for income earned in 1991.

3. A Court's Discretion to Impose a Fine to Coerce Compliance with its Orders Is Limited and the Constitution's Excessive Fines Clause Has Been Violated -- The court of appeals' affirmance of the district court's contempt order is contrary to this Court's precedent defining the limits of a court's authority to exercise its civil contempt power in accordance with the Constitution's Excessive Fines Clause.

The district court's contempt order must be reversed because of the degree to which this contempt proceeding has departed from the standard in Bloom v. Illinois, 391 U.S. 194 (1968), cited by Justice Scalia in his concurring opinion in Young, et al. v. United States ex rel.

Vuitton et fils, 481 U.S. 418, 823 (1987):

> First, it [Bloom] eliminates this Court's only holding that the courts must have autonomous power to hold litigants in contempt as a means of enforcing their judgments. And second, it makes clear that the argument from necessity to the existence of an inherent power must be restrained by the totality of the Constitution, lest it swallow up the carefully crafted guarantees of liberty.

The plain language of 18 U.S.C. § 401 limits a court's discretion to punish by fine contempt of its authority, and "...none other, as...(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

The threshold question in this case is whether the turnover orders of the bankruptcy court and district court are lawful decrees issued within the court's statutory authority to exercise jurisdiction. 28 U.S.C. § 1334 grants a district court original and exclusive jurisdiction

of all cases under title 11 and exclusive jurisdiction of all of the property of a debtor's estate as of the commencement of the case. 28 U.S.C. § 157(b) grants authority to a bankruptcy judge to hear and determine all cases under title 11 arising, inter alia, from matters concerning administration of the estate, turnover of the estate's property, avoidance of fraudulent conveyances, and the sale of the estate's property.

This case concerns a transaction involving the sale of property after confirmation. The trustee did not succeed to physical possession, custody or control of the concrete pumps at the commencement of the proceedings. (App. at 38a) The petitioner conveyed title of the property to the Buyer under the provisions of a

special warranty deed.

The bankruptcy court relied on a provision in the Bank's plan to exercise jurisdiction to issue its turnover order, Art. XIV, Retention of Jurisdiction, p. 41, notwithstanding that the plan's reservation of jurisdiction is limited to matters related to the determination of timely filed preconfirmation claims of creditors, see Holywell, slip op., p. 10, and "any orders which may be necessary or appropriate to carry out the plan's provisions.

In United States v. City of Yonkers, 856 F.2d 644, 659 (2nd Cir. 1988), the Second Circuit held that "...the law of contempt exerts some outer limits on the normally 'wide discretion' of a district court to fashion appropriate remedies to

secure compliance with its lawful orders." Similarly, this Court's opinion in Spallone v. United States, 110 S.Ct. 625, 633 (1990), citing the Second Circuit's opinion in Yonkers, 856 F.2d at 454, quoting Anderson v. Dunn, 6 Wheat 204, 231 (1821), stated as follows:

> ...the use of the contempt power places a[n]...limitation on a district court's discretion, for as the Court of Appeals recognized, "in selecting contempt sanctions a court is obliged to use the 'least possible power adequate to the end proposed."

The limits of a court's discretion to impose a fine to coerce compliance with its lawful orders are explained in United States v. United Mine Workers, 330 U.S. 258, 303 (1946), in relevant part, as follows:

> ...where the purpose is to make the defendant comply, [the court]...**must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable**

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> **effectiveness of any suggested sanction in bringing about the result desired.**
>
> It is a corollary of the above principle that a court which has returned a conviction for contempt must, **in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant.** (Emphasis added)

The Eleventh Circuit's affirmance of the district court's civil contempt order is also in conflict with the Ninth Circuit Court of Appeals' opinion in Donovan v. Mazzola, 761 F.2d 1411, 1417 (9th Cir. 1985), that a present inability to comply is a complete defense to civil contempt, and the past ability to comply is not res judicata as to a continuing ability to comply.

As this Court held in United States v. Rylander, 460 U.S. 752 (1983), the ability to comply is a crucial inquiry for

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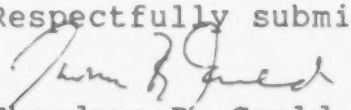
a court's decision concerning coercive civil contempt orders, and the court is required to weigh all the evidence properly before it determines whether or not there is actually a present ability to obey and whether failure to do so constitutes a deliberate defiance or wilfull disobedience which a coercive sanction will remedy. See also Maggio v. Zeitz, 333 U.S. 56, 76 (1948).

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,



Theodore B. Gould
pro se
P.O. Box 6279
Charlottesville, Virginia 22906
(804) 295-7125

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-5741

D.C. Docket No. 89-2629-CIV-SM
D.C. Docket No. 84-1590-94-SMW

IN RE: HOLYWELL CORPORATION, Debtor.

THEODORE B. GOULD, Plaintiff-Appellant,

versus

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust, BANK OF NEW YORK,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

---

(July 6, 1992)

BEFORE BIRCH, Circuit Judge, JOHNSON* and BOWNES**, Senior Circuit Judges.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1

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*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Hugh H. Bownes, Senior U.S. Circuit Judge for the First Circuit, sitting by designation.

APPENDIX A

App. 3a

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-5741

IN RE: HOLYWELL CORPORATION, Debtor.

THEODORE B. GOULD, Plaintiff-Appellant,

versus

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust, BANK OF NEW YORK,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: BIRCH, Circuit Judge, JOHNSON* and BOWNES**, Senior Circuit Judges.

PER CURIAM:

( ) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not

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*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Hugh H. Bownes, Senior U.S. Circuit Judge for the First Circuit, sitting by designation.

having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor it it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

_____

UNITED STATES CIRCUIT JUDGE

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-5741

D.C. Docket No. 89-2629-CIV-SM
D.C. Docket No. 84-1590-94-SMW

IN RE: HOLYWELL CORPORATION, Debtor.

THEODORE B. GOULD, Plaintiff-Appellant,

versus

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust, BANK OF NEW YORK,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

---

(July 6, 1992)

BEFORE BIRCH, Circuit Judge, JOHNSON* and BOWNES**, Senior Circuit Judges.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1

Costs are taxed against plaintiff-appellant.

Entered: July 6, 1992
For the Court: Miguel J. Cortez, Clerk

By:
Deputy Clerk

ISSUED AS MANDATE:

---

*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Hugh H. Bownes, Senior U.S. Circuit Judge for the First Circuit, sitting by designation.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-5741

IN RE: HOLYWELL CORPORATION, Debtor.

THEODORE B. GOULD, Plaintiff-Appellant,

versus

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust, BANK OF NEW YORK,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

---

ORDER:

( ) The motion of Appellant, for ( ) stay (xx) recall and stay issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of Appellant, for (XX) stay ( ) recall and stay of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period mentioned above there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate

shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____ under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____, for a further stay of the issuance of the mandate is DENIED.

_____
UNITED STATES CIRCUIT JUDGE

APPENDIX B

App 11a

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-2629-CIV-MARCUS

THEODORE B. GOULD,

Appellant,

vs.

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust.

Appellee

IN RE: HOLYWELL CORPORATION et al.

Debtors

ORDER

THIS CAUSE comes before the Court upon Motion by Fred Stanton Smith, the Trustee of the Miami Center Liquidating Trust, for

an Order confirming the Bankruptcy Court's Order Finding Theodore B. Gould in Contempt, dated August 1, 1989.

On August 1, 1989, the United States Bankruptcy Court for the Southern District of Florida found Theodore B. Gould in contempt of court if he failed and refused to deliver over certain monies as ordered by August 4, 1989. See Order Finding Theodore B. Gould in Contempt, August 1, 1989, Case No. 84-01590-BRK-SMW, 84-01591-BKC-SMW, 84-01592-BKC-SMW, 84-01593-BKC-SMW, 84-01594-BKC-SMW, para. 8. On Aug. 14, 1989, the United States Bankruptcy Court certified to this Court that Theodore Gould was in contempt for his failure to comply with the Order of August 1, 1989. Such certification was issued as provided in Rule 9020, Rules of Bankruptcy Procedure, and directed that

Mr. Gould be punished as provided in the Order of August 1, 1989.

This Court conducted a hearing on December 14, 1990, concerning whether Mr. Gould was in contempt of Court for the reasons set forth in the decisions of the bankruptcy court. The relevant facts are as follows:

In October 1981, Theodore B. Gould purchased certain concrete pumps and related equipment. Upon the filing of his Chapter 11 proceeding in 1984, the concrete pumps and related equipment became the property of his estate pursuant to 11 U.S.C. § 541(a). Thereafter, and pursuant to the terms of the confirmed bankruptcy plan of reorganization, the concrete pumps and related equipment became the property of the Miami Center Liquidating Trust. See Order Finding Theodore B. Gould in Contempt at 1-2. In

1989, Mr. Gould was contacted by Mr. Lawrence G. McMillan who was interested in buying the concrete pumps and related equipment. Before the sale was consummated, Mr. Gould was notified that the Liquidating Trustee claimed the right to receive the sale proceeds. Mr. Gould refused to allow the sale proceeds to be paid to the Liquidating Trustee, insisting that the contract for the sale of the concrete pumps and related equipment be made in his name alone, and that payment be paid to him. Id. By agreement dated June 2, 1989, Mr. Gould contracted to sell the pumps and equipment to Mr. McMillan for $67,500. The funds were paid to Mr. Gould, without the consent of the Liquidating Trustee. Id.

Under the bankruptcy court's August 1, 1989 Order Finding Theodore B. Gould in Contempt, Mr. Gould was required to turn

over net proceeds from the sale of trust property. If Mr. Gould failed to comply by August 4, 1989, a $1000/day fine was to be imposed until the proceeds were turned over. The bankruptcy court further found Mr. Gould to be in violation of its Order and concluded that Mr. Gould should also be punished by a period of incarceration not to exceed ten (10) days. Moreover, the bankruptcy court concluded that Mr. Gould was found to be in criminal contempt in that Mr. Gould's failure to comply with the courts' orders was done in the presence of the court, and that Gould announced his intention not to comply. Funds from the sale are presently held by Mr. Gould in his name at a brokerage firm and have been invested in short-term commercial paper, according to Mr. Gould. He refuses to reveal the brokerage firm and refuses to turn the money over to the Trustee. He has

stated he will not obey any order of the bankruptcy court to do so. Id.

In Mr. Gould's Reply to the Liquidating Trustee's Response to Objections to Certification of Contempt, he contends that (1) the bankruptcy court lacks post-confirmation jurisdiction over Mr. Gould; (2) the Liquidating Trustee was illegally appointed and therefore had no right to pursue this matter; (3) Mr. Gould is not required to turn over the proceeds from the sale of the concrete pumps because the Miami Center Liquidating Trust has evaded its tax obligations; and (4) the concrete pumps were not an asset of the Miami Center Liquidating Trust.

We address each of Mr. Gould's arguments in turn. First, the bankruptcy court does not lack post-confirmation jurisdiction over him. Article XIV of the confirmed plan of reorganization explicitly

provides that the bankruptcy court retains jurisdiction over Mr. Gould and his co-debtors in order to enter any order necessary or appropriate to enforce the plan.[1] The reorganization plan is confirmed and is the law of this case. See

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[1]Article XIV, Retention of Jurisdiction, states specifically:

The Court shall retain jurisdiction after confirmation until all payments and distributions called for under the Plan have been made and until the entry of final decree, in respect to the following matters:

(a) to hear and determine all claims, including claims arising from the rejection of any executory contract and any objections which may be made thereto;
(b) to liquidate, or estimate damages or to determine the manner and time for such liquidation or estimation in connection with any contigent or unliquidated claims;
(c) to adjudicate all claims or controversies arising during the pendency of the Chapter 11 cases;
(d) to allow or disallow any claim; and
(e) to make any orders which may be necessary or appropriate to carry out the provisions of this Plan, including any orders relating to the reservation of equitable rights set forth in Article XIII thereof.

Holywell Corp. v. Bank of New York, 59 Bankr. 340 (S.D.Fla. 1986), dismissed sub nom, Miami Center Liquidating Trust v. Bank of New York, 838 F.2d 1547 (11th Cir.), cert. denied, 488 U.S. 823, 109 S. Ct. 69, 102 L.Ed. 2d 46 (1988). The plan is binding on Mr. Gould, pursuant to 11 U.S.C. § 1142.

Next, Mr. Gould argues that the concrete pumps are not assets of the Miami Center Liquidating Trust because they were not specially itemized as trust assets by the confirmed plan and thus reverted to him upon the confirmation of the plan. However, the reorganization plan as confirmed states clearly and unambiguously that all of the debtors' assets, as defined by Section 541(a) of the Bankruptcy Code,[2]

[2] 11 U.S.C. Section 541(a) (1) includes as estate assets: "Except as provided in subsection (b) and (c)(2) of this section, all legal or equitable interests of the

[Footnote continued on next page]

are assets of the Miami Center Liquidating Trust. See Article V of the plan.[3] The concrete pumps are Section 541(a) assets and the plan's provisions are binding. See 11 U.S.C. § 1142.

[Footnote continued from previous page] debtor in property as of the commencement of the case."

[3] Article V, Creation of Trust, states:

(1) A Trust is hereby declared and established on behalf of the Debtors effective on the Effective Date and an individual to be appointed by the Court ... is designated as Trustee of all property of the estates of the Debtors within the meaning of § 541(a) of the Code, including but not limited to Miami Center, the Washington Proceeds, and all claims and causes of action, if any, of the Debtors ... to hold, liquidate, and distribute such Trust Property according to the terms of this Plan. The Trust shall be known as the "Miami Center Liquidating Trust.

(2) On the Effective Date, all right, title, and interest of the Debtors in and to the Trust Property, including Miami Center, shall vest in the Trustee, without further act or deed by the Debtors or any other of them, and without the filing or recording of any instrument of conveyance, assignment or transfer, subject however, to all existing liens, mortgages, security interests and encumbrances.

Third, Mr. Gould claims that the Liquidating Trustee cannot pursue this matter because the Trustee was appointed illegally in derogation of the Bankruptcy Code. Article V of the plan, however, provides specifically for the appointment of a trustee of the Miami Center Liquidating Trust to implement the plan.[4] Mr. Gould's attempt to appeal the plan was not successful. See Holywell v. Bank of New York, 59 Bankr. 340. The Liquidating Trustee was appointed by order dated August 12, 1985; that order was not appealed by Mr. Gould or anyone else.

Finally, Mr. Gould asserts that he need not turn over the concrete pumps sale proceeds because the Miami Center Liquidating Trust refuses to pay certain income taxes. The question of whether the Trust must pay taxes is not relevant to the

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[4] See note 3, supra.

issue of ownership of the concrete pumps. Moreover, the Eleventh Circuit Court of Appeals has determined that the Trust does not have the tax obligations Mr. Could seeks to impose. See In re Holywell, 911 F.2d 5071 (11th Cir. 1990).

In sum, none of the grounds argued by Mr. Gould demonstrate that he should not be certified to be in contempt. We have conducted a de novo review of the record in this case, as required under Bankruptcy Rule 9033(d). After so doing, we accept the findings of fact and conclusions of law of the Bankruptcy Court. Mr. Gould sold an asset of the Miami Center Liquidating Trust and pocketed the proceeds, without the consent of the Liquidating Trustee and in direct violation of a court order.

The only remaining question is whether Mr. Gould's actions amount to civil or criminal contempt or both. The Bankruptcy

Court stated that it was finding Mr. Gould in contempt under Rule 9020(a) and (b) of the Rules of Bankruptcy Procedure. Rule 9020 governs criminal contempt proceedings and indeed, in its order finding contempt, the Bankruptcy Court applied Rule 9020 because when ordered to comply by the Bankruptcy Court on July 27, 1989, Mr. Gould announced in the presence of that court his intention not to do so.[5]

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[5] Rule 9020 is entitled "Criminal Contempt Proceedings" and provides as follows:

(a) **Contempt committed in presence of bankruptcy judge**

Contempt committed in the presence of a bankruptcy judge may be determined summarily by the bankruptcy judge. The order of contempt shall recite the facts and shall be signed by the bankruptcy judge and entered of record.

(b) **Other contempt**

Contempt committed in a case or proceeding pending before a bankruptcy judge, except when determined as provided in subdivison

[Footnote continued on next page]

However, the nature of the bankruptcy court Order--imposition of a $1000/day fine until such time as Mr. Gould complies--is more

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[Footnote continued from previous page]

(a) of this rule, may be determined by the bankruptcy judge only after a hearing on notice. The notice shall be in writing, shall state the essential facts constituting the contempt charged and describe the contempt as criminal or civil and shall state a time and place of hearing, allowing a reasonable time for the preparation of the defense. The notice may be given on the court's own initiative or on application of the United States attorney or by an attorney appointed by the court for that purpose. If the contempt charged involves disrespect to or criticism of a bankruptcy judge, that judge is disqualified from presiding at the hearing except with the consent of the person charged.

(c) **Service and effective date of order; review**

The clerk shall serve forthwith a copy of the order of contempt on the entity named therein. The order shall be effective 10 days after service of the order and shall have the same force and effect as an order of contempt entered by the district court unless, within the 10 day

[Footnote continued on next page]

characteristic of a civil contempt finding.

The Supreme Court has said that the words used by the lower court to describe the contempt are not determinative. Shillitani v. United States, 384 U.S. 364, 369, 86 S. Ct. 1531, 1535, 16 L.Ed.2d 622 (1966). The same actions by a party can amount to both civil and criminal contempt. United States v. United Mine Workers, 330 U.S. 258, 299, 67 S. Ct. 677, 698-99, 91 L.Ed. 884 (1947). It is the nature and purpose of the punishment that is determinative. Id. at 297, n.64 (citations omitted), Hicks v. Feiock, 108 S. Ct. 1423, 1429-31 (1988). The commonly stated distinction is that "if the penalty is to compensate the complaining party or to

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[Footnote continued from previous page]
period, the entity named therein serves and files with the clerk objections prepared in the manner provided in Rule 9033(b). If timely objections are filed, the order shall be reviewed as provided in Rule 9033.

coerce the defendant into complying with the court's orders, the contempt is civil, while if the penalty is punitive, intended to vindicate the authority of the court, then the contempt is criminal." Hubbard v. Fleet Mortgage Co., 810 F.2d 778, 781-82 (8th Cir. 1987), citing United Mine Workers, 330 U.S. at 302-04. See also Latrobe Steel Co. v. United Steelworkers of America, 545 F.2d 1336, 1343 (3rd Cir. 1976). As a result, "the penalties arising cut of adjudications of criminal contempt are generally an absolute fine of a specific amount or a determinative period of confinement." Id.

While the bankruptcy court found Mr. Gould to be in criminal contempt, it appeared to intend a coercive as well as a punitive sanction. While we adopt the Bankruptcy Court's findings, we now find Theodore B. Gould to be in civil contempt

of court.[6] See Shillitani, 86 S. Ct. at 1535 (parties had briefed the issues with reference to criminal contempt, but "the contempt orders were remedial, and therefore might well be deemed civil in nature rather than criminal.")

By the order of this Court we direct Mr. Gould to comply fully with the August 1, 1989 Order of the Bankruptcy Court in so far as it directed him to turn over to the Liquidating Trustee the $67,500 sales proceeds received in the sale of the concrete pumps and related equipment, together with any interest earned on or since the time of the sale, less $1000 in expenses incurred in consummating the sale. Mr. Gould shall comply with the terms of the Order of this Court within seven (7) days of the date of this order. The

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[6] We take no position at this time on the merits of a criminal contempt finding with respect to Mr. Gould.

failure to comply fully and timely with the Order of this Court shall result in the imposition of sanctions, including but not limited to a daily fine in the amount of $1000 per day for each day Mr. Could may fail to comply. It is therefore

ORDERED and ADJUDGED that the Motion by Fred Stanton Smith, Trustee of the Miami Center Liquidating Trust, is hereby GRANTED and Mr. Gould is directed to comply with the Order of this Court in the manner prescribed by this Court.

DONE AND ORDERED at Miami, Florida, this _____ day of May, 1991.

STANLEY MARCUS
UNITED STATES DISTRICT
JUDGE SOUTHERN DISTRICT
OF FLORIDA

cc: Counsel of record

Theodore B. Gould
2564-B Ivy Road
Charlottesville, VA 22901

APPENDIX C

App 28a

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-2629-CIV-MARCUS

THEODORE B. GOULD,

Appellant,

vs.

FRED STANTON SMITH, Trustee of the Miami Center Liquidating Trust,

Appellee.

IN RE: HOLYWELL CORPORATION et al.,

Debtors.

ORDER
DENYING STAY AND REHEARING

THIS CAUSE comes before the Court upon Appellant Theodore B. Gould's Motions for

Stay, Rehearing, and Granting Judicial Notice. For the reasons detailed below, the Motion for Stay is DENIED, the Motion for Rehearing is DENIED, and the Motion for Granting Judicial Notice is GRANTED. By Order entered on May 17, 1991, we granted the Motion by Fred Stanton Smith, the Trustee of the Miami Center Liquidating Trust, and we specifically directed Mr. Gould to comply with the August 1, 1989 Order of the Bankruptcy Court in so far as it directed him to turn over to the Liquidating Trustee $67,000 in sales proceeds received in the sale of certain concrete pumps and related equipment, together with any interest earned on or since the time of sale, less $100 in expenses incurred in consummating the sale. Mr. Could was directed to comply with the Order of May 17 within seven days.

Appellant's Motion for Stay is now premised on the granting of a writ of certiorari issued by the Supreme Court on May 28, 1991. The Supreme Court granted certiorari on a lawsuit arising from the same bankruptcy proceedings which are the foundation of the instant case. See In re Holywell Corporation, 911 F.2d 1539 (11th Cir. 1990), cert. granted Holywell Corp. v. Smith, 114 L.Ed.2d 476, 59 U.S.L.W. 3793 (1991). On appeal from the bankruptcy court, the federal district court determined that a liquidating trustee was not required by the provisions of a confirmed amended Plan of Reorganization nor by statutory provisions to file tax returns and pay income taxes on the sale of pre-confirmation and post-confirmation properties. The Eleventh Circuit Court of Appeals affirmed the district court. The Supreme Court agreed to consider that

question. However, the tax issue, we believe, lies outside the focus of the instant action and the May 17 Order of this Court. As we stated in our Order of May 17, 1991, "[t]he question of whether the Trust must pay taxes is not relevant to the issue of ownership of the concrete pumps." Order at 6. We did not premise our contempt order upon the bankruptcy court's "agreement with the trustee that he is not responsible for the payment of the federal income taxes," Appellant's Motion for Stay at 3. Nor did we hold that the bankruptcy court had so premised its certification of contempt. Id. Rather, we stated clearly and unambiguously that Appellant was to be held in contempt because "Mr. Gould sold an asset of the Miami Center Liquidating Trust and pocketed the proceeds, without the consent of the Liquidating Trustee and in direct violation

of a court order." See Order of May 17, 1991, at 6.

Mr. Gould argues that if the Supreme Court reverses the Eleventh Circuit's determination that the Trust is not responsible for the claimed taxes, and if Mr. Gould then brings an action for breach of fiduciary duty against the Liquidating Trustee for not paying those taxes, and if Mr. Gould then obtains a judgment against the Liquidating Trustee, and if that judgment includes as damages Mr. Gould's attorney's fees in appealing the tax decision, then perhaps he could not be held in contempt for diverting trust proceeds and using the asserts for his own purposes. Mr. Gould's argument is speculative and hypothetical. Moreover, even if he should prevail as to the tax matter, the underlying realities of the instant action remain the same: Mr. Gould sold a Trust

asset, kept the proceeds, and took such action without the consent of the Liquidating Trustee and in direct violation of a court order. It is for these things that he was found in civil contempt of court and directed to comply. We have heard nothing new or different and accordingly, we believe the Motion for Stay should be DENIED.

We also note that Mr. Gould has failed to address the ordinary requirements for obtaining a stay. See Garcia-Mir v. Meese, 781 F. 2d 1450 (11th Cir. 1986). These criteria include: (a) whether the movant has demonstrated a likelihood of success on the merits; (b) whether the movant has a made a showing of irreparable injury if the stay is not granted; (c) whether the non-moving party will be injured if the stay is granted; and (d) whether the public interest will be served by granting the

stay. All four requirements must be met. Mr. Gould does not meet even the first. Given that he has admitted that he took the property of the Trust without permission and that he diverted proceeds from the sale of such property for his personal use, he has little likelihood of success on reversing the contempt order. On this basis alone we would deny the motion for stay. In addition, we note that no stay should be granted unless it is conditioned on the posting of a supersedeas bond for the amount of the sale proceeds plus twice the statutory rate of interest. See Fed. Rule of Civ. P. 62(d); Fla. R. App. P. 9.310(b)(2); Fla. Stat. § 55.03 (1981). See also Sterling v. Blackwelder, 405 F.2d 884 (4th Cir. 1969) (appeal from order confirming judicial sale was dismissed as moot for failure to comply with this rule allowing appellant to obtain a stay by

giving a supersedeas bond); United States v. Jenkins, 153 F. Supp. 636 (S.D. Ga. 1957) (Defendant who appealed from judgment but did not tender supersedeas bond in amount of judgment subjected himself to action brought by plaintiff to enforce judgment while appeal was pending in court of appeals and in the United States Supreme Court.).

We add that Mr. Gould's statement that he cannot comply with the Court's Order because he has used the funds which he was required to return to appeal the tax obligation issue has no bearing on the basis for which Mr. Could was held in contempt. Furthermore, such representation conflicts directly with those he made in proceedings before the bankruptcy court at which time he stated that the proceeds from the sale of the concrete pumps had been invested "in GMAC 30 day paper at 9.21

percent interest." Transcript from Hearing of Fred Stanton Smith, Trustee, on Motion for Contempt, July 27, 1989, at 63, lines 15-19. At the same hearing, Mr. Gould refused to identify the brokerage firm at which the account was held. Id. at lines 24-25. Mr. Gould next stated that

> I will not turn over the funds until there is a resolution of the trustee's responsibility for the payment of income taxes for the bankruptcy estate since I considered Judge Weaver's decision with respect to the income taxes, that is the Trustee's lack of responsibility, I consider that null and void.

Id. at 64-65. No where does Mr. Gould indicate that he planned to expend the very funds at issue to appeal the question the resolution of which he stated would await before turning over the funds. His comments in bankruptcy court almost two years ago illustrate his intention to flout any orders of any court requiring him to return the proceeds of the concrete pump

sales. We find no basis in Mr. Gould's Motion for Rehearing to alter our Order of May 17, 1991. Finally, as the above discussion indicated, this Court has taken notice of the grant of certiorari by the Supreme Court in Holywell Corp. v. Smith, 911 F.2d 1539.

Accordingly, for the foregoing reasons,

Theodore B. Gould's Motion for Stay is DENIED, his Motion for Rehearing is DENIED, and his Motion for Granting Judicial Notice is GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this ____ day of June, 1991.

STANLEY MARCUS
UNITED STATES DISTRICT JUDGE

APPENDIX D

App 38a

IN THE

UNITED STATES BANKRUPTCY COURT

IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

IN RE:

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Debtors.

ORDER
FINDING THEODORE B. GOULD IN CONTEMPT

THIS CAUSE having come on to be heard on July 27, 1989, upon Motion for Contempt and other relief filed by the Liquidating

Trustee, and the Court having reviewed the pleadings on file, having heard argument of counsel, and having reviewed a stipulated set of facts agreed to by the parties involved, and being otherwise fully advised in the premises, it is hereupon

ORDERED AND ADJUDGED as follows:

1. In October 1981, THEODORE B. GOULD purchased certain concrete pumps and related equipment. Upon the filing of his Chapter 11 proceeding in 1984, the concrete pumps and related equipment became property of his estate pursuant to 11 U.S. Code, Section 541(a). Thereafter, pursuant to the terms of the confirmed Plan of Reorganization, the concrete pumps and related equipment became the property of the MIAMI CENTER LIQUIDATING TRUST.

2. In 1989, THEODORE B. GOULD was contacted by Lawrence G. McMillan, who was interested in buying the concrete pumps and

related equipment. Before the sale was consummated, MR. GOULD was notified the Liquidating Trust claimed the right to receive the sale proceeds. MR. GOULD refused to allow the sale proceeds to be paid to the Liquidating Trustee and insisted the contract for the sale of the concrete pumps and related equipment be made in his name, and that payment for the concrete pumps and related equipment be paid to him.

3. Thereafter, by Agreement dated June 2, 1989, THEODORE B. GOULD contracted to sell the concrete pumps and related equipment to Lawrence G. McMillan for $67,500.00. The funds were paid to MR. GOULD

4. The funds are presently held by MR. GOULD in his name at a brokerage firm and have been invested in short-term commercial paper. MR. GOULD refuses to

reveal the brokerage firm, refuses to turn the money over to the Trustee and has stated he will not obey any order of this Court to do so.

5. Upon the foregoing facts, the Court finds and determines that THEODORE B. GOULD is required to turn over to the Liquidating Trustee the $67,500.00 sale proceeds received, together with any interest earned, less $1,000.00 in expenses incurred in consummating the sale, together with any interest that may have been earned on the sale by no later than 5:00 P.M. on Monday, July 31, 1989.

7. If MR. GOULD should fail to deliver to the Liquidating Trustee the funds described above, then in that event the Court fines THEODORE B. GOULD the sum of $1,000.00 for each day from and including August 1, 1989, until the funds are delivered as ordered. The fine will

continue until the Order is obeyed. The fine is payable into the Court Registry. The Court finds and determines the imposition of this fine is a reasonable and necessary means of enforcing this Order, given the persistent and deliberate refusal of the Defendant, THEODORE B. GOULD to obey the Order of this Court and the frustration of the Liquidating Trustee's ability to perform his functions as Trustee. See United Mine Workers of America, 330 U.S. 258, 67 S. Ct. 677, 91 L.Ed. 884 (1947); and in re: Chase and Sandborn Corp. ___ F.2d (11 Cir. May 1989) (slip sheet opinion at pages 2365-66).

8. If THEODORE B. GOULD shall fail and refuse to deliver over the monies as ordered by Friday, August 4, 1989, then in that event, in addition to the $1.000.00 a day fine referred to above, the Court further finds and certifies to the United

States District Court that THEODORE B. GOULD is in contempt of this Court and its Orders by his failure and refusal to comply with its Orders concerning payment of monies to the Trustee. THEODORE B. GOULD should be punished by the continued imposition of the fine set out in this Order and by a period of incarceration not to exceed ten (10) days (or until compliance, whichever first occurs).

9. The Court further finds and determines this certification is for a contempt committed both under Rule 9020(a) and (b) of the Rules of Bankruptcy Procedure in that THEODORE B. GOULD was in the presence of the Court and was ordered to comply by the Court on July 27, 1989, and has announced his intention not to do so.

DONE AND ORDERED in Chambers, Miami, Dade County, Florida this _____ day of _____, 1989.

_____
SIDNEY M. WEAVER
United States Bankruptcy Judge

Herbert Stettin, Esquire, upon receipt wil immediately mail conformed copies of this Orde to all attorneys of record.

BEST AVAIL

APPENDIX E

App 45a

IN THE

UNITED STATES BANKRUPTCY COURT

IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-01590/91/92/93/94 BKC-SMW

HOLYWELL CORPORATION, et al.

Debtors.

ORDER

CERTIFYING THEODORE B. GOULD TO BE IN CONTEMPT

The Court having previously entered on order dated August 1, 1989, finding Theodore B. Gould in contempt upon the grounds stated therein, and having provided in said Order that Theodore B. Gould would have until Friday, August 4, 1989, within which to comply with the Order of the

ABLE COPY

Court, and the Court being otherwise fully advised in the premises, it is hereupon

ORDERED AND ADJUDGED AS FOLLOWS:

1. All of the terms, findings and conclusions contained in the Order of August 1, 1989, finding Theodore B. Gould in contempt be and they are hereby adopted, and incorporated is if set forth herein. A copy of the Order finding Theodore B. Gould in contempt dated August 1, 1989, is attached hereto is an exhibit to this order.

2. By Affidavit of Herbert Stettin, the attorney for Fred Stanton Smith, the Trustee of the Miami Center Liquidating Trust. The Court has been advised that Theodore B. Gould has failed and refused to comply with the Court's Order of August 1, 1989, within the time permitted by the Court.

3. As provided in Rule 9020, Rules of Bankruptcy Procedure, this Order is entered for the purpose of certifying to the United States District Court that Theodore B. Gould is in contempt of this Court and should be punished as provided in the Order of August 1, 1989, a copy of which is attached hereto as Exhibit 1.

DONE AND ORDERED IN CHAMBERS, MIAMI, FLORIDA, THIS _____ DAY OF AUGUST, 1989.

_____
United States Bankruptcy Judge

conformed copies:
Herbert Stettin, Esquire
upon receipt will immediately
mail conformed copies to
all counsel of record.

and

Robert M. Mark, Esquire
Theodore B. Gould, pro se
(Sent directly by Court)

APPENDIX F

App 48a

IN THE

UNITED STATES BANKRUPTCY COURT

IN AND

FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

IN RE:

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Debtors.

MOTION FOR CONTEMPT AND OTHER RELIEF

Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust ("Liquidating Trustee"), moves the Court for an order certifying Theodore B. Gould

as being in contempt of this Court and for other sanctions, and says:

1. This case pends as a consolidated confirmed Chapter 11 proceeding in which Theodore B. Gould is one of the Chapter 11 Debtors.

2. On information and belief, the Liquidating Trustee has been advised, and therefore alleges, that at some time Prior to the filing of the Chapter 11 cases, Theodore B. Gould paid for and acquired two concrete pumps which were used in the construction of the Miami Center. On the filing of the Chapter 11 proceedings in August, 1984, these pumps became property of the estate, as provided in Section 541(a) of the Bankruptcy Code. At confirmation of the Plan of Reorganization, these pumps became property of the Liquidating Trust, as provided in the plan.

3. Thereafter, the pumps remained stored at the premises of the Miami Center after the sale of the property to the nominee of the Bank of New York.

4. In February 1989, the attorney for the Bank of New York demanded of the Liquidating Trustee that he move the concrete pumps from the premises. A copy of the demand letter of February 17, 1989 is attached hereto as Exhibit A. The Liquidating Trustee contacted Theodore B. Gould to determine whether the pumps were in fact stored on the bank's property. The Liquidating Trustee's response of February 28, 1989 is attached hereto as Exhibit B.

5. Thereafter, by letter dated March 6, 1989, the Bank of New York's nominee demanded the Liquidating Trustee pay the personal property taxes for the concrete pumps in question. A copy of the

demand letter and 1988 personal property tax notice is attached hereto as composite Exhibit C.

6. A prospective purchaser named Lawrence McMillan, representing C.P.I. of Kansas City, Kansas, expressed interest in the concrete pumps for a construction job with which he was involved. The Liquidating Trustee referred Mr. McMillan to Edgar Schumacher of Holywell Corporation to discuss a purchase price.

7. On or about June 1, 1989, Mr. McMillan and his local attorney, Brad Lotspeich, advised the liquidating Trustee that a price of $67,500.00 had been agreed upon between Mr. McMillan and Mr. Gould, and that Mr. Gould had shown them his canceled personal check issued prior to the filing of the petition initiating these proceedings as evidence that he paid for the concrete pumps in question. Mr. Gould

further advised Mr. McMillan that he was only willing to proceed with the transaction if they would deliver to him a cashier's check payable to him individually for the purchase of the concrete pumps. Mr. McMillan and his attorney asked the Liquidating Trustee whether the Liquidating Trust had any continuing interest in the pumps. The Liquidating Trustee advised them of the interest of the Liquidating Trust. Mr. McMillan and his attorney advised the Liquidating Trustee they had spoken with Mr. Gould concerning this and Mr. Gould had said he would not enter into the agreement to sell the concrete pumps if he did not receive the funds.

8. Thereafter, the Liquidating Trustee was advised that on June 5, 1989 the sale was consummated and Mr. McMillan, as Trustee, had paid $67,500.00 in the form of a cashier's check to Theodore B. Gould

as payment of the concrete pumps. A two page contract in the form of a bill of sale was executed to evidence the sale. The Liquidating Trustee does not yet have a copy of the agreement but is attempting to obtain one.

9. The concrete pumps are the property of the Liquidating Trust. Mr. Gould was well aware of the ownership interest of the Liquidating Trust in this property and chose to dispose of this property for the express purpose of receiving the proceeds therefrom. Mr. Gould explained to the Liquidating Trustee that he would not permit any of the proceeds to be paid to the Liquidating Trust, or to be held by the Liquidating Trust, so long as the Liquidating Trustee failed or refused to pay income tax liabilities owed by the Debtors. As the Court is well aware, there is a final

judgment in adversary proceeding 87-0627-BKC-SMW-A determining the Liquidating Trust has no obligation to file tax returns or pay income taxes owed by the Debtors.

10. Theodore B. Gould holds $67,500.00 that belongs to the Liquidating Trust and he should be required to pay over these sums immediately. His receipt of these monies is a willful and deliberate attempt to interfere in the operation of the Liquidating Trust. It is the latest in a series of acts designed to disobey this Court's orders, frustrate the Liquidating Trustee from completing his responsibilities under the terms of the plan, and is a violation of the Bankruptcy Code and his contractual responsibilities.

11. At an earlier stage in these proceedings, such conduct would have been sufficient to bar his discharge. At this

stage in the proceedings, in addition to such other relief as would be appropriate, the Liquidating Trustee seeks an order certifying Theodore B. Gould as being in contempt of this Court's Order of Confirmation and the provisions of Section 1142 of the Bankruptcy Code. Mr. Gould has converted to his own use property of the Liquidating Trust. Because his conduct was willful and designed to deliberately frustrate the operation of the Liquidating Trust, and because this is the latest in a series of acts designed to frustrate the operation of the Liquidating Trust, it is appropriate that the punishment recommended by the Court should include effective means to punish this willful misconduct and to deter future misconduct.

12. In addition to such other relief as the Court deems appropriate Mr. Gould

should be fined on a daily basis until these funds have been restored to the Liquidating Trust.

WHEREFORE, the Liquidating Trustee moves the Court for an order certifying Theodore B. Gould as being in contempt, and for such other relief as the Court deems appropriate.

RESPECTFULLY SUBMITTED,

_____

Herbert Stettin, Esquire

APPENDIX G

App 57a

IN THE

UNITED STATES BANKRUPTCY COURT

THE SOUTHERN DISTRICT OF FLORIDA

CHAPTER 11

CASE NOS. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

In re:

MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES
HOLYWELL CORPORATION and
THEODORE B. GOULD

OBJECTIONS TO ORDER OF CONTEMPT

Theodore B. Gould, pro se, ("Objector") files the following objections to the Order Finding Theodore B. Gould In Contempt ("Contempt Order"), entered by the

bankruptcy court on August 1, 1989. These objections are filed pursuant to Bankruptcy Rules 9020 and 9033 for the purpose of obtaining de novo review of the Contempt Order by the United States District Court for the Southern District of Florida.

In accordance with Bankruptcy Rule 9033, Objector objects to the following specific findings or conclusions in the Contempt Order on the grounds stated below:

1. The Trustee has no interest in the property of Theodore B. Gould's bankruptcy estate, the subject concrete pumps or the proceeds from the sale of such pumps on June 2, 1989.

(a) The bankruptcy court lacked the statutory authority to appoint a trustee after confirmation and vest title to the property of Theodore B. Gould's estate in a trustee, relieving such Trustee

of the duty to discharge requirements of law, specifically, inter alia, the payment of federal and state income taxes on behalf of Theodore B. Gould's bankruptcy estate.

(1) It is a fundamental principle in defining the jurisdiction of courts created in accordance with the constitutional arrangement of political institutions in the United States that the jurisdiction of such courts is defined by act of Congress and to the degree that the powers and authority of courts of the United States inferior to the Supreme Court have not been supplied by written law, their judgments not based upon such specifically defined powers are null and void.

The Supreme Court recently restated this fundamental principle in Finley v. The United States, 57 L.W. 4557 (U.S. May 22, 1989):

"In 1807 Chief Justice Marshall wrote for the Court that 'courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point, no member of the bench has, even for an instant, been dissatisfied.' Ex parte Bollman, 4 Cranch 75, 93 (1807). It remains rudimentary law that '[a]s regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it....To the extent that such action is not taken, the power lies dormant.' The Mayor v. Cooper, 6 Wall. 247, 252 (1868) (emphasis added); accord, Christianson v. Colt Industries Operating Co., 486 U.S. ___ ___ (1988); Firestone Tire & Rubber Co. v. Risjor'd, 449 U.S. 368, 379-380 (1981); Kline v. Burke Construction Co., 260 U.S. 226, 233-234 (1922); Case of the Sewing Machine Companies, 18 Wall. 553, 577-578, 586-587 (1874); Sheldon v. Sill, 8 How. 441, 449 (1850); Cary v. Curtis, 3 How, 236, 245 (1845);

McIntire v. Wood, 7 Cranch 504, 506 (1813)." [Emphasis added]

(2) Any individual appointed and designated a trustee[1] by a court of the

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[1] Article V, Creation of Trust, paragraph 1 provides:

> "1. A Trust is hereby declared and established on behalf of the Debtors effective on the Effective Date and an individual to be appointed by the Court (and if requested, after nominations by any party-in-interest) is designated as Trustee of all property of the estates of the Debtors within the meaning of Section 541(a) of the Code, including but not limited to, Miami Center, the Washington Proceeds, and all claims and causes of action, if any, of the Debtors described in Exhibit C and those pending in the litigation against BNY ("Trust Property") to hold, liquidate, and distribute such Trust Property according to the terms of this Plan. The Trust shall be known as the 'Miami Center Liquidating Trust'."

Reference to Mr. Smith as a "liquidating" trustee is a misnomer. The term "liquidating" trustee was introduced into the proceedings in response to the debtors' objections, filed on April 11, 1985, to the

[Footnote continued on next page]

United States is required to discharge the common law duties of a fiduciary and the requirements of law imposed upon a trustee. If Mr. Smith had been appointed a trustee

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[Footnote continued from previous page] feasibility of the Bank of New York's proposed Consolidated Plan of Reorganization, and was for the specific purpose of avoiding the payment of federal and state income taxes incurred during the administration of the estate and arising from the proposed sale of the Miami Center. The Bank of New York's attorneys and counsel for the Unsecured Creditors' Committee introduced the term "liquidating" trustee in reliance upon the Eleventh Circuit's conclusion in Cusato Brothers International, Inc., 750 F.2d 887 (11th Cir.), cert. denied 472 U.S. 1010 (1985) that a trustee engaged in a liquidation process is not "conducting any business" within the meaning of 28 U.S.C. Section 960 and thus does not incur tax liability.

The Supreme Court has, however, recently reversed the decisions of the various circuit courts of appeal which had found such reasoning persuasive and, citing the legislative history of 28 U.S.C. Section 960, concluded in California State Board of Equalization v. Sierra Summit, Inc., 57 U.S. L.W. 4639 (June 12, 1989), that any receiver, assignee, trustee, manager, liquidator or other officers or agents appointed by any United States court is subject to all federal, state and local taxes applicable to such business.

in accordance with Section 1104(a), 11 U.S.C. Section 1106(a)(1), (3),[2] (6),[3] and (7)[4] would have specified his duties,

---

[2] 11 U.S.C. Section 1106(a)(3) provides as follows:

"(a) A trustee shall --

(3) except to the extent that the court orders otherwise, investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;"

[3] 11 U.S.C. Section 1106(a) (6) provides as follows:

"(a) A Trustee shall --

(6) for any year for which the debtor has not filed a tax return required by law, furnish, without personal liability, such information as may be required by the governmental unit with which such tax return was to be filed, in light of the condition of the debtor's books and records and the availability of such information;"

[4] 11 U.S.C. Section 1106(a) (7) provides

[Footnote continued on next page]

including filing tax returns on behalf of Theodore B. Gould's bankruptcy estate and payment of the income taxes incurred.

Since the statutory authority of a bankruptcy court is specifically defined in the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, if such court has the authority to appoint a trustee after confirmation for the purpose of carrying out the Plan in accordance with 11 U.S.C. Section 1142(a), the duties of such trustee and the professional persons in his employ as attorneys and accountants must be subject to the bankruptcy statutes and rules, common law, and applicable

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[Footnote continued from previous page] as follows:

"(a) A Trustee shall --

(7) after confirmation of a plan, file such reports as are necessary or as the court orders."

non-bankruptcy laws, including the Internal Revenue Code.

(b) The creation of the Miami Center Liquidating Trust and the appointment of Fred Stanton Smith, as Trustee of said Trust, was for the unlawful purpose, inter alia, of avoiding the payment of federal and state income taxes. The net sale proceeds of the concrete pumps $66,500 plus accrued interest represent taxable income to Theodore B. Gould's estate for the calendar year ending December 31, 1989, and the Trustee has denied responsibility for making the income tax return and payment of the taxes payable as a statutory liability.

(1) On April 28, 1988, the bankruptcy court entered an order relieving the Trustee of the responsibility for making the income tax returns and paying the income taxes incurred during the

administration of Theodore B. Gould's bankruptcy estate.

(2) On July 31, 1988, on appeal before the district court in the United States of America v. Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust, et al, and Holywell Corporation, Theodore B. Gould, et al. v. Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust, consolidated Case Nos. 88-0795-Civ-Kehoe and 88-1053-Civ-Kehoe, entered a Memorandum Opinion affirming the bankruptcy court's decision relieving the Trustee of the responsibility for the payment of income taxes for the corporate estate of Holywell Corporation, and for Theodore B. Gould's bankruptcy estate, concluding relevant to Theodore B. Gould's objections as follows:

> "...the Liquidating Trustee is a contract trustee, rather than a 'trustee in a case under title 11';...."

> "...the bankruptcy court ruled that the Liquidating Trust is a grantor trust and...a grantor may be taxed individually as the owner of the trust. If the trust income is, 'or in the discretion of the grantor or non-adverse party, or both may be' applied to discharge a legal obligation of the grantor.... As a non-adverse party within the meaning of the Code...the Liquidating Trustee is authorized to use the Trust income to discharge the debtors' legal obligations. As such, the debtors may be taxed as grantors...." [Emphasis added]

(c) Fred Stanton Smith is a "contract" trustee appointed in accordance with Article V, Creation of Trust, of the confirmed Plan of Reorganization proposed by the Bank of New York and adopted for the sole benefit of the Bank of New York and third-party creditors.

(d) The Trustee was appointed after confirmation without satisfying the statutory requirements of 11 U.S.C. Section 1104(a). Theodore B. Gould has been discharged as an individual debtor in

accordance with Section 1141, and cannot be required to perform duties under an unlawful contract to which he did not consent.

(e) Since the Trustee is not the statutory successor to Theodore B. Gould's Section 541(a) assets, and the equitable powers of a bankruptcy court are limited to the application of the principles of equitable subordination in accordance with 11 U.S.C. Section 510(c) related to the determination of the hierarchical priorities in the allowance of claims involved in restructuring debtor-creditor relations, any rights of contract or of property the Trustee claims must be adjudicated in an Article III court, capable of satisfying Theodore B. Gould's right to a jury trial. See Granfinanciera, S.A., et al.. v. Nordberg, Creditor Trustee for the Estate of Chase & Sanborn Corp.,

FKA, General Coffee Corp., (In re Chase & Sanborn), 57 L.W. 4898 (U.S. June 23, 1989).

(1) The subject Order Finding Theodore B. Gould In Contempt, entered on August 1, 1989, was based upon a Motion For Contempt, filed by Herbert Stettin, Esq., the Trustee's attorney, alleging that Theodore B. Gould has breached his "contractual responsibility" to the Trustee and has engaged in a fraudulent conveyance. Mr. Gould has denied that he has any contractual responsibility to the Trustee with respect to the Plan's implementation by means forbidden by law, specifically the avoidance of federal and state income taxes.

(2) The bankruptcy court's appointment of Fred Stanton Smith as Trustee of the Miami Center Liquidating Trust, after confirmation, which purported

to vest title and possession of the debtors' property in said Trustee, in accordance with the provisions of the confirmed Plan, proposed by the Bank of New York on behalf of the debtors, while relieving the Trustee of the statutory duty to make the income tax returns and pay the income taxes of Theodore B. Gould's bankruptcy estate is unlawful. Thus, ab initio, each and every act of the Trustee from the inception of his appointment is null and void.

2. The bankruptcy court's jurisdiction is limited to the allowance or disallowance of claims as part of a process of restructuring debtor-creditor relations. Id., 57 L.W. 4905. The value or sale proceeds of the concrete pumps was not specifically enumerated as an asset required for the Plan's implementation in

Article IV, Means For Execution Of The Plan.[5]

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[5] Article IV, Means For Execution Of The Plan, of the confirmed Plan states in relevant part as follows:

"Sale of Miami Center

The Plan would be implemented by a sale of Miami Center to BNY or its designee for a purchase price of $255,600,000 pursuant to a contract of sale substantially in the form of Exhibit A annexed hereto (the "Contract of Sale"). Within 5 business days after the Effective Date, the Trustee and BNY or its designee would execute the Contract of Sale, which requires a closing of title within 45 days after the Effective Date.

The purchase price would be paid and applied in the following manner:

(a) BNY would receive a credit for the amount of the BNY Debt plus expenses to the Miami Center Closing Date, which, assuming a closing date of June 1, 1985, and no change in BNY's Prime Rate, would be $236,587,618.
(b) BNY would pay the balance of the purchase price in cash (approximately $19,012,382) to the Trustee.....

Upon the passing of title of Miami

[Footnote continued on next page]

3. The various courts of appeal have adopted the general rule that the predicate of a bankruptcy court's jurisdiction is the possession of property, and upon

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[Footnote continued from previous page]
Center to BNY, BNY's lien and security interest in the Washington Proceeds and the other collateral shall be limited to the BNY-Holywell Loan, and the balance of the Washington Proceeds will be available for distribution to Creditors."

Vance Salter, Esq., attorney for the Bank of New York, specified the means available for the Plan's implementation on May 31, 1985, in a hearing related to the availability of funds for payment of the Miami Center Joint Venture's claim, as follows:

> "...We are offering to pay $19 million, the difference between the adjudicated amount of our lien...and to release our collateral $31 million net of some expenses [i.e., the court authorized 'super-priority' loans], which your Honor has approved previously, maybe $28 million remaining now. So we are offering to release in essence, and put to the disposition of the creditors for the payment of liens, taxes, city and county taxes, the IRS, all of the creditors in these estates $47 million."

"substantial consummation" in accordance with 11 U.S.C. Section 1101(2) transferring the estate's property to the entity formed for the purpose of carrying out the plan,

> "The jurisdiction of the bankruptcy court over the property is generally said to terminate and does not follow it, [except to the extent that]... the bankruptcy court may nevertheless exercise jurisdiction 'over a dispute involving the rights and priorities of private parties after a sale where the dispute involves a review and clarification of the bankruptcy proceedings leading to the sale.' [Citation omitted] Similarly, the bankruptcy court may not, as a general rule, adjudicate disputes between third parties not involving the bankrupt or his property, Evarts v. Elroy Gin Corp., 204 F.2d 712, 717 (9th Cir. 1953), but it may determine third-party disputes when necessary to administer the estate completely. O'Dell v. United States, 326 F.2d 451, ,455 (10th Cir. 1964)."[6] [Emphasis added]

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[6] In re Samoset Associates, 654 F.2d 247, 253 (1st Cir. 1981).

A bankruptcy court has limited jurisdiction and its "... power to act must be found expressly or impliedly in the Bankruptcy Act."[7] Bankruptcy courts lack jurisdiction over controversies not involving claims against the debtor or its property and controversies in which the bankrupt and its unsecured creditors have no interest.[8]

4. The authority of the bankruptcy court to hold Theodore B. Gould in contempt for discharging a responsibility required by law and his fiduciary duty depends entirely on whether the bankruptcy court's order "... was in whole or in part beyond the power of the court...[and] was in

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[7] First State Bank and Trust Co. v. Sand Springs State Bank, 528 F.2d 350, 353 (10th Cir. 1976).

[8] Matter of Paso Del Norte Oil Co., 755 F.2d 421, 425 (5th Cir. 1985), citing Nixon v. Michaels, 38 F.2d 420, 424 (8th Cir. 1930).

excess of jurisdiction, was void, and the court [has] no right in law to punish for any contempt of its unauthorized requirements. Such is the settled rule of decision..."[9] The Supreme Court of the United States has uniformly held as applied to the limits upon the authority of a court of the United States to exercise its contempt power:

> "When a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void....A judgment which lies without the jurisdiction of a court, even one of superior jurisdiction and general authority, is, upon reason and authority, a nullity."[10] [Emphasis added]

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[9] Ex Parte Rowland, 104 U.S. 604 (1881).

[10] Ex Parte Terry, 128 U.S. 289, 305 (1888), quoting Ex Parte Fisk, 113 U.S. 713, 718.

The bankruptcy court has misconstrued the Supreme Court's opinion in United Mine Workers as applied to finding Theodore B. Gould in contempt and imposing sanctions upon him for performing his duty as required by law. United Mine Workers stands for the following rule:

> "The right to remedial relief falls with an injunction which events prove was erroneously issued...[citations omitted] and a fortiori when the injunction or restraining order was beyond the jurisdiction of the court."[11]

5. The contempt power of federal courts is defined in 18 U.S.C. Section 401, which states as follows:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as --
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

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[11] United States v. United Mine Workers of America, 330 U.S. 258, 295 (1946).

> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistence to its lawful writ, process, order, rule, decree, or command."

Thus, although the contempt power is inherent in the "judicial power" vested in courts of the United States,[12] it is subject to limits imposed by act of Congress:

> "...the very amplitude of the power is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper...."[13]

The Constitution of the United States is based upon the fundamental principle that it is a right of the individual to have open access to the courts and impartial judgment, insuring a lawful

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12 Ex Parte Robinson, 86 U.S. 505, 511 (1873).

13 Gompers v. Bucks Stove & Range Company, 221 U.S. 416, 445 (1911).

remedy for injuries to person and property. It is the duty and obligation of the courts to insure that justice prevails. This constitutional guarantee secures the individual against the arbitrary acts and usurpation of power of any office holder.

> "It insures the right of every person...to seek remedy by [the actions of a court of competent jurisdiction] for any injuries done to him in his person or property and entitles him to have justice administered according to law without denial or delay. In other words, it assures a litigant the right to prosecute an action, provided he prosecutes it as contemplated by law." 16A C.J.S. Section 708. Constitutional Law, XIII. Right To Justice and Remedy For Injuries.

The due process clause "...is a restraint on the legislative as well as on the executive and judicial powers of the government...."[14] The Bill of Rights is based upon the principle that the

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[14] Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272 (1856).

Constitution deprives the individual and States of specifically enumerated powers granted to Congress for the purpose of enacting laws in accordance with Article I, Section 8, to the President for the execution of the Laws of the United States, and to the judiciary for the administration of the Laws of the United States. The 9th and 10th Amendments insure that powers not specifically enumerated in the Constitution to Congress, the President, and the judiciary, shall not be construed as denying or disparaging rights retained by the people, including, most importantly, the right of redress of wrongful injury in a court of competent jurisdiction.

Theodore B. Gould denies that the procedural requirements of due process have been satisfied for the bankruptcy court's finding in paragraph 9, certifying Theodore B. Gould committed criminal

contempt in the presence of the court "... both under Rule 9020(a) and (b) of the Rules of Bankruptcy Procedure."

Bankruptcy Rule 9020(b) provides:

> "Nothing in this rule shall be construed to impair the right to jury trial whenever it otherwise exists."

The Order setting the contempt hearing and the Motion For Contempt upon which the bankruptcy court's Order Finding Theodore B. Gould In Contempt specifically state that:

> "The essential facts constituting the alleged contempt charge are contained in the motion and are adopted herein. The contempt charge is civil."

The bankruptcy judge did not see or hear conduct constituting criminal contempt in his actual presence on July 27, 1989, and did not exercise his power in accordance with Bankruptcy Rule 9020(a)(1) to summarily punish Theodore B. Gould.

The Order entered on August 1, 1989 is without notice and hearing stating the essential facts constituting the criminal contempt charged and describing the contempt as criminal, in accordance with the requirements of Bankruptcy Rule 9020(a)(2). Theodore B. Gould was not allowed a reasonable time for preparation of a defense against a charge of criminal contempt and the essential facts upon which the Motion For Contempt was filed provide a basis only for civil contempt, if the bankruptcy court had jurisdiction in personam to enjoin or restrain Theodore B. Gould for refusing to comply with an order which that court had no authority to make.

For the foregoing reasons, Objector requests that the district court reject the proposed Contempt Order by the bankruptcy court and enter an Order dismissing with

prejudice the contempt proceeding filed by the Trustee.

Respectfully submitted,

THEODORE B. GOULD, pro se
2464-B Ivy Road
Charlottesville, VA 22901
(804) 295-7125

By: _____
Theodore B. Gould, pro se

APPENDIX H

App 83a

IN THE

UNITED STATES BANKRUPTCY COURT

IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NOS. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

IN RE:

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Debtors.

RESPONSE TO
OBJECTIONS TO ORDER OF CONTEMPT

FRED STANTON SMITH, Trustee of the Miami Center Liquidating Trust ("Liquidating Trustee"), submits this Response to Objection to Order of Contempt,

in accordance with Bankruptcy Rule 9033(b), and says:

1. Mr. Gould's objections to the bankruptcy court's order of contempt arising out of Mr. Gould's sale of certain trust assets (the concrete pumps) are, for lack of better words, objectionable and contemptuous themselves. The arguments made ignore the law of the case and a decent respect for the courts which have administered this case.

2. Mr. Gould's statement that the "Trustee has interest in the property of Theodore B. Gould's bankruptcy estate, the subject concrete pumps or the proceeds from the sale of such pumps on June 2, 1989" (Objection to Order of Contempt at 1) is Alice In Wonderland talk. The plan of reorganization, as confirmed, unequivocally states that all of the debtors' assets, as defined by Section 541(a) of the Bankruptcy

Code, are assets of the Miami Center Liquidating Trust. Mr. Gould has already stipulated in open court that the pumps are 541(a) assets. That plan has been confirmed and is the law of this case. See Holywell Corporation v. The Bank of New York, 59 B.R. 340 (S.D. Fla. 1986), dismissed as moot sub nom, Miami Center Limited Partnership v. The Bank of New York, 838 F.2d 1547 (11th Cir. 1988), certiorari denied, ____U.S.____, 109 S.Ct. 69, 102 L.Ed. 2d 46 (1988). Mr. Gould's petition for writ of mandamus was also denied. In re Theodore B. Gould, ____U.S.____, 109 S.Ct. 198, __L.Ed.2d__ (1988). Mr. Gould's collateral attack on the plan should not be permitted.

3. Equally worth noting is Mr. Gould's assertion that the bankruptcy court lacks jurisdiction over him. Every court in which Mr. Gould has raised this

issue has rejected it. The Liquidating Trustee refers to and relies upon the voluminous record in these proceedings rather than go through the oft-used and successful rebuttal to Mr. Gould's contortions of the law.

4. Mr. Gould further argues that reference to Mr. Smith as "Liquidating Trustee" is a misnomer (Objections to Order of Contempt at 3, n.1). This contention is specious. Even Mr. Gould's wholly-owned and controlled subsidiaries refer to the "Liquidating Trustee" as such in five (5) lawsuits filed in the United States District Court for the Western District of Virginia.

5. In the same footnote, Mr. Gould goes on to misstate the holding of California State Board of Equalization v. Sierra Summit, Inc., 57 U.S.L.W. 4639 (June 12, 1989), which has no applicability

to the issues herein. The correct holding of Nierra Summit is: "Nothing in the plain language of the statute 28 U.S.C. Section 960], its legislative history, or the structure of the Bankruptcy Code indicates that Congress intended to exclude taxes on the liquidation process from those taxes the States may impose on the bankrupt estate." 57 U.S.L.W. at 4641 (emphasis supplied). The issue was whether a state sales tax could be imposed on a liquidation sale of bankruptcy estate assets.

6. Mr. Gould claims he "cannot be required to perform duties under an unlawful contract to which he did not consent." (Objection to Order of Contempt at 6). It is this statement which best exemplifies Mr. Gould's contemptuous conduct. The plan is binding on him, regardless of his opinions as to the plan's validity, and regardless of whether he

voted to accept it. See In re Blanton Smith Corporation, 81 B.R. 440 (Bankr. M.D. Tenn. 1987); In re Sanders, 81 B.R. 496 (Bankr. W.D. Ark. 1987); In re Monroe Well Service, Inc., 80 B.R. 324 (Bankr. E.D. Pa. 1987); In re Jartran, Inc., 76 B.R. 123 (Bankr. N.D. Ill. 1987); In re St. Louis Freight Lines, Inc., 45 B.R. 546 (Bankr. E.D. Mich., N.D.1984).

7. Mr. Gould's claim that he can safely convert trust assets because the plan does not require the Liquidating Trustee to pay income taxes defies all logic, particularly where the Bankruptcy Court and the District Court have held the law imposes no duty on the Liquidating Trustee to file tax returns or pay federal income taxes under the facts of this case.

8. Further, Mr. Gould's claim that he can ignore court orders he deems null and void if the orders violated in fact are

determined by the courts to be erroneous is misplaced. Firstly, the confirmation of the Plan is beyond attack. Secondly, a person must obey a court order even if the order is invalid, Lindsey v. Ipack, 732 F.2d 619, 622 (8th Cir. 1984), for the remedy is to appeal the order and obtain a stay. Maness v. Meyers, 419 U.S. 449 458-59, 95 S.Ct. 591, 42 L.Ed.2d 574 (1984). Mr. Gould and the other debtors that he controls cannot disobey orders of the courts they consider to be invalid without suffering the consequences.

9. Mr. Gould's complaint that the Order of Contempt found him in criminal contempt and that he was denied due process because the motion for contempt only charged civil contempt is unfounded. The Order of Contempt finds Mr. Gould in contempt under Bankruptcy Rules 9020(a) and (b). No where is criminal contempt found.

Theodore B. Gould, appearing pro se, submits the following comments in reply to the "Response To Objections To Order Of Contempt," filed on August 21, 1989, by Herbert Stettin, Esq., ("Stettin") on behalf of Fred Stanton Smith, Trustee of the Miami Center Liquidating Trust ("liquidating trustee")[1]:

1. Notwithstanding Mr. Stettin's response that various judges of the United States District Court for the Southern District of Florida have concluded that the bankruptcy court has authority to exercise jurisdiction over Theodore B. Gould as a discharged debtor after confirmation, Response, p. 2, the controlling law and rule of decision with respect to this cause requires that the first issue which must be

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[1] Reference to the liquidating trustee's "Response To Objections To Order Of Contempt" will be cited as "Response, p. ___."

resolved in this case is whether this Court, or the court below,[2] has the power to undertake by the process of contempt to punish a person for refusing to comply with an order which that court had no authority to make.[3]

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[2] See Birmingham Post Company v. Brown, 217 F.2d 127, 130 (5th Cir. 1954), quoting Mansfield, Coldwater & L.M.R. Co. v. Swan, 111 U.S. 379, 382 (1884):

> "On every writ of error or appeal the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

[3] See Ex Parte Rowland, 104 U.S. 604 (1881): ". . . was [the court's order] in whole or in part beyond the power of the court . . . [and] in excess of jurisdiction, was void, and the court [has] no right in law to punish for any contempt of its unauthorized requirements. Such is the settled rule of decision...." [Emphasis added]

See Ex Parte Terry, 128 U.S. 289, 305

[Footnote continued on next page]

It is the liquidating trustee's burden to show that the bankruptcy court has jurisdiction after confirmation over Theodore B. Gould's conduct as a discharged individual debtor and his pleadings must state the facts essential to establish jurisdiction. 217 F.2d 127 at 131.

This case concerns the liquidating trustee's position, upon the advice of counsel, that he is not liable for the payment of income taxes arising from postconfirmation income earned by the fiduciary estates in his custody. Mr. Stettin has relied upon the bankruptcy

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[Footnote continued from previous page] (1888), quoting Ex Parte Fiske, 113 U.S. 713, 718: "When a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void....A judgment which lies without the jurisdiction of a court...is, upon reason and authority, a nullity." [Emphasis added]

court's judgment, affirmed by the district court, that no law imposes a duty upon the liquidating trustee to file tax returns or pay federal income taxes,[4] see Response, pp. 3-4.

On September 18, 1990, a panel of the Eleventh Circuit entered a divided opinion, concluding that the liquidating trustee was

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[4] Compare Beaston v. The Bank of Delaware, 12 Pet. 102, 136 (1838): "No one can be divested of his property, by any mode of conveyance, statutory or otherwise, unless at the same time, and by the same conveyance, the grantee becomes invested with title.... The moment the transfer of property takes place, under statute, the person taking it, whether by voluntary assignment or by operation of law, becomes bound to the United States for the faithful performance of the trust." [Emphasis added] See also 28 U.S.C. Section 960, which provides, in relevant part, as follows:

> "Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business as if it were conducted by an individual or corporation."

not responsible for the payment of income taxes on behalf of Theodore B. Gould's individual debtor's estate[5] arising from the sale after confirmation of the insolvent debtor Miami Center Limited Partnership's property. The majority's opinion concluded that the bankruptcy court's administration of the estate ended as an effect of confirmation,[6] In re Holywell, 911 F.2d 1539, 1545 (11th Cir. 1990), and, thus, "the reorganized debtor, not the liquidating trustee is responsible for...taxes," Id, related to income earned

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[5] Compare 26 U.S.C. Section 6012(b)(4) which provides as follows:

> "Returns of an estate, a trust, or an estate of an individual under Chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof."

[6] "Administration of the estate ceases upon confirmation of a plan of reorganization."

from postconfirmation sales of the estate's property.

If the administration of the estate has ended as an effect of confirmation, then the bankruptcy court's authority to exercise jurisdiction over Theodore B. Gould as a discharged debtor must be limited by the plan's provisions and the bankruptcy statutes and rules.[7]

The plan's Article VIII, Duties of The Debtors, [Exhibit A] limits the bankruptcy court's authority to exercise jurisdiction after confirmation over Theodore B. Gould as a discharged debtor for the purpose of "devot[ing] such time and attention to the affairs of the estates as are necessary...to comply with reasonable

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[7] See Reese v. Beacon Hotel Corp., 149 F.2d 610, 611 (2nd Cir. 1945): "...we have repeatedly held that reservation beyond what is requisite to effectuate a plan of reorganization is beyond the power of the reorganization court."

requests" of the Bank and liquidating trustee (a) "[i]n connection with the distribution to the creditors of the Washington Proceeds" and (b) "supply[ing] all information" required for the timely prosecution of objections to claims."

2. The second question which this Court must resolve is whether the plan's provisions have granted authority to the liquidating trustee to receive postconfirmation income on behalf of the individual debtor's estate as a "receiver" and use such funds for the payment of timely-filed allowed claims.[8]

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[8] The plan's Article I, Definitions, defines an "Allowed Claim"," in relevant part, as "A Claim...a proof of which is filed within the time fixed...by the court...as to which no objection to the allowance thereof has been filed within any applicable period of time fixed by an order of the court...." [Emphasis added]

An "Administrative Claim" is defined, in relevant part, as "A cost or expense of the administration of these Chapter 11 cases, including any actual, necessary expenses of

[Footnote continued on next page]

(a) The bankruptcy court's Confirmation Order, entered on August 8, 1985, 54 B.R. 41 (Bkrtcy. S.D. Fla. 1985), concluded that the amended plan filed by the Bank on the debtors' behalf "meets each of the requirements specified in 11 U.S.C. Section 1129(a) and (b)."[9]

Since it is undisputed that the bankruptcy court's appointment of the liquidating trustee did not satisfy the statutory requirements of 11 U.S.C.

[Footnote continued from previous page] preserving the estates and...operating the debtors' business from and after the petition dates, to and including the confirmation date." [Emphasis added]

[9] 11 U.S.C. Section 1129(a)(1) grants a bankruptcy court authority to confirm a plan only if the plan complies with the applicable provisions of title 11. Compare Olympia & York Florida Equity Corp. and Miami Center Joint Venture v. The Bank of New York, 913 F.2d 783 (1990), in which the Eleventh Circuit affirmed the district court's reversal of the bankruptcy court's Confirmation Order, having concluded that the plan did not satisfy the Fair And Equitable Standard. 11 U.S.C. Section 1129(b)(1).

Section 1104(a) and his appointment was based upon Section 1123(a)(7),[10] in accordance with the plan's Article V, Creation of Trust, [Exhibit B] p. 20, the bankruptcy court's equitable powers to appoint Fred Stanton Smith as the individual designated Trustee of the Miami Center Liquidating Trust were limited by 11 U.S.C. Section 105(b).[11]

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[10] 11 U.S.C. Section 1123(a)(7) provides that the contents of a plan shall "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any...trustee under the plan...." [Emphasis added]

[11] 11 U.S.C. Section 105(b) provides as follows:

> "Notwithstanding subsection (a) of this section, a court may not appoint a receiver under this title." [Emphasis added]

See also Collier On Bankruptcy, 15th Ed., Vol. 5, Sec. 1104 (1986), citing H. R. Rep. 595, 95th Cong., 1st Sess, 232-34 (1977): "...section 105(b) prohibits the appointment of a receiver ['under any circumstances'] in a title 11 case...."

(b) The Eleventh Circuit's "Mootness" ruling, entered March 10, 1988, directing the district court to dismiss the debtors' appeal of the bankruptcy court's Confirmation Order, Miami Center Limited Partnership v. The Bank of New York, 838 F.2d 1547 (11th Cir. 1988), was based upon granting deference of the "clearly erroneous" standard of review to the bankruptcy court's adoption in toto of findings of fact and conclusions of law proposed by The Bank of New York, as the prevailing party, concluding that the plan's substantial consummation precluded granting judicial relief:

> "No stay is in effect, and the confirmed plan has been consummated. The debtors' property passed to the Liquidating Trustee, and the debtors were discharged under Code Section 1141." [Emphasis added] Id. at 1552.

Since the mandate of the Eleventh Circuit's "mootness" ruling concludes that

Theodore B. Gould, as an individual debtor, was discharged as an effect of confirmation under Section 1141, this Court must determine what assets were revested in the discharged debtor upon confirmation, and specifically whether the concrete pumps, owned by Theodore B. Gould prior to the date of filing, were assigned to the liquidating trustee upon the plan's Effective Date.[12] See 11 U.S.C. Section 1141(b).[13]

11 U.S.C. Section 1141(d)(3) provides that "the confirmation of a plan does not

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[12] See Article V, Creation of Trust:

> "On the Effective Date, all right, title and interest of the Debtors in and to the Trust Property, including Miami Center, shall vest in the Trustee, without further act or deed by the Debtors...." [Emphasis added]

[13] 11 U.S.C. Section 1141(b) provides "Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor."

discharge a debtor if (a) the plan provides for the liquidation of all or substantially all of the property of the estate." [Emphasis added] However, the Eleventh Circuit has held that the individual debtor Theodore B. Gould has been discharged and that "the liquidating trustee is not a trustee under title 11, but rather a contract trustee performing limited and essentially ministerial duties," citing In re Alan Wood Steel Co., 7 B.R. 697 (Bkrtcy. E.D. Pa. 1980), for the conclusion that "the liquidating trustee's non-discretionary duties of distributing the trust property in accordance with the plan makes him similar to a disbursing agent rather than an assignee or fiduciary." Id.[14]

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[14] See Disclosure Statement, V. MIAMI CENTER LIQUIDATING TRUST [Exhibit C]"

"The Trustee's principal duties

[Footnote continued on next page]

As the court held in Alan Wood, a disbursing agent is not assigned title to the property of a debtor's estate. Although there is no provision in the Bankruptcy Code for the appointment of a "liquidating and disbursing agent," disbursing agents were appointed under Rule 11-38(a) of the Bankruptcy Act of 1898, as amended, requiring the court at the first meeting after acceptance and before confirmation of a plan to designate a person specially appointed to distribute funds specifically deposited as consideration for the payment of claims.

[Footnote continued from previous page]
will be to administer the affairs of the Miami Center, the only operating asset of the Debtors, pending the sale to BNY, to hold title to the remainder of the assets of the Debtors, including the Washington Proceeds, and to supervise diytributions [sic] to creditors...."

In the present case, the plan's Article IV, Means For Execution Of The Plan, see Exhibit D, defines the assets available for payment of claims. The bankruptcy court's "Order Approving Liquidating Trustee's First Report In Conjunction With Consummation Of Confirmed Plan," see Exhibit E, held that the total cash available for the payment of claims in Classes 1, 4, of claims in Classes 1, 4, 5, 6, 7, 8, and 9 was in the amount of $30,423,206.42.

No provision in the plan granted authority to the liquidating trustee to hold and use postconfirmation income for the payment of claims, and 11 U.S.C. Section 105(b) prohibited the bankruptcy court from appointing an agent, for the purposes of carrying out the plan's provisions, granted the powers of a

"receiver" to receive income on behalf of another person's estate.

Furthermore, the Eleventh Circuit's "mootness" ruling was based, in part, on the conclusion that the bankruptcy court had assured itself that the plan provided adequate funds for the payment of claims and that the Feasibility Standard, 11 U.S.C. Section 1129(a)(11), was satisfied:

> "The court also found that it had the unusual opportunity to observe the substantial consummation of the reorganization plan and that its 'fairness, feasibility and propriety'[15] had been verified by

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[15] Compare the Eleventh Circuit's conclusion in In re Holywell, 913 F.2d 783 at ____, affirming the district court's reversal of the bankruptcy court's Confirmation Order:

> "At issue in this appeal is whether the Bank's plan complies with the applicable provisions of title 11, namely section 1122. See 11 U.S.C. Section 1129(a)(1) (requiring that the plan comply

[Footnote continued on next page]

> these occurences: administrative claims had been paid or reserved; secured claims had been paid in full; class 3 claims had been paid in full 'undisputed claims in Class 4 through 6 had been paid in full and funds reserved for disputed claims....There remained sufficient funds for the satisfaction in full or in part of the claims of the Gould-affiliated claimants...." [Emphasis added] 838 F.2d 1547 at 1552.

The Eleventh Circuit found that the total funds available for the payment of claims was the net proceeds of $12.5 million derived from the sale of the Miami Center and the Washington Proceeds of

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[Footnote continued from previous page] with the provisions of title 11). Also at issue is whether the Bank's plan discriminates unfairly with respect to MCJV, a creditor who was impaired under, and who has not accepted the plan. See 11 U.S.C. Section 1129(b)(1) (requiring that the plan not discriminate unfairly with respect to classes of impaired claims.)

$30 million.[16] Id. at 1556. The Court found that the liquidating trustee had appeared before the district court and stated that:

> "...he had paid some $14 million in claims, had reserved some $9 million for claims disputed or in litigation, and held some $8 million-$9 million in cash plus some $7 million in a reserve for contested taxes." Id.

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[16] On May 31, 1985, Mr. Vance Salter, the Bank's attorney, made the following statement clarifying the means for executing of the plan:

> "...We are offering to pay $19 million, the difference between the adjudicated amount of our lien...and to release our collateral $31 million net of some expenses [i.e., the court-authorized "super-priority" loans], which your Honor has approved previously, maybe $28 million remaining now. So we are offering to release in essence, and put to the disposition of the creditors for the payment of liens, taxes, city and county taxes, the IRS, all of the creditors in these estates $47 million." [Emphasis added] (Bkrtcy., Transcript, May 31, 1985).

Thus, based upon the trustee's pleadings and the bankruptcy court's order approving the liquidating trustee's First Report, the means available for distribution to creditors and the payment of disputed real property taxes was $42,923,206 and the total payments and reserves required was approximately $34.3 million, leaving a remainder in cash of "some $8 million-$9 million." In fact, the total non-insider claims paid in accordance with the plan's provisions was $20,853,839 and $4,084,000 is required as a reserve, including interest, for the payment of disputed real estate taxes, as of August 31, 1990,

Uniformity of the decisions among the various judges of the United States District Court for the Southern District of Florida requires that this Court grant judicial notice to the judgment of Senior

District Court Judge S. M. Aronovitz in a related case, in which Judge Aronovitz denied the bankruptcy court's contempt orders against Theodore B. Gould for failure to satisfy its orders concerning discovery related to his business conduct after confirmation.[17]

On May 16, 1989, Judge Aronovitz had the following colloquy with S. Harvey Ziegler, the Bank's attorney, pertinent to the issues in this case:

> THE COURT: "...the [Bank of New York] is the one that proposed this flawed plan... and it is a result of that flawed plan that has brought about much of what has happened in the last several years (p. 45)....[W]hy were we led to believe that the assets that were intended by the Plan to be included in the Trust were those specific assets that were described in

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[17] Fred Stanton Smith, as Trustee of the Miami Center Liquidation Trust v. Theodore B. Gould, et al., Nos. 89-0948 and 89-1451-Civ-SMA (S.D. Fla., August 30, 1990).

> and part of the papers that were strewn throughout this court and which appear in my orders as well? Why did it go beyond what was specifically stated in all of those papers?" [Emphasis added]
>
> MR. ZIEGLER: "...it was specifically stated in the Plan that the Plan would use all assets of the Debtors."
>
> THE COURT: "It was not so stated. It did describe that the Plan included all of the assets but it was not so represented to the court that all of the assets would be used or needed in order to satisfy the entire estate. That's two different things." (p. 47) [Emphasis added]

3. The third question which this Court must resolve is related to the position that Mr. Stettin has consistently taken that although various aspects of the confirmed plan do not comply with the provisions of title 11 and applicable nonbankruptcy laws, nevertheless the plan is a contract binding upon Theodore B. Gould.

Mr. Stettin's position raises the application of the Nuremburg Principle -- the constitutional arrangement of the political institutions in the United States preclude the conclusion that a duty could be imposed upon the individual to submit to unlawful orders of a court[18] or any other officeholder of government.

The issues concerning the bankruptcy court's authority to exercise jurisdiction after confirmation over Theodore B. Gould as a discharged debtor and a determination of what assets have been revested as a matter of law are important public policy questions related to the liquidating trustee's position, relying upon the

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[18] There is a serious question concerning the liquidating trustee's lawful authority, since his appointment is based solely upon the creation of a creditors' trust under the provisions of a plan which do not comply with provisions of title 11. 11 U.S.C. Section 1129(a)(1); In re Holywell, 913 F.2d 783 (1990).

Eleventh Circuit's opinion, that he is not responsible for the payment of taxes on income earned postconfirmation on behalf of Theodore B. Gould's individual estate.

If Theodore B. Gould had submitted to the bankruptcy court's order and turned over the sale proceeds of the concrete pumps to the liquidating trustee as part of the estate created by his Section 541(a) property, there would be no controversy and this case would be moot. See Flast v Cohen, 392 U.S. 83, 95 (1968).[19] However, the bankruptcy court's order, entered on March 9, 1989, affirmed by the district court on August 30, 1990,[20] has held that

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19 "...the business of the federal courts [is limited] to questions presented in an adversary context."

20 Holywell Corporation, Theodore B. Gould, et al. v. Fred Stanton Smith, No. 89-1080-Civ-Aronovitz: "The court notes that many of the arguments raised by the appellants in this appeal are actually attempts to relitigate issues that have

[Footnote continued on next page]

the liquidating trustee is not responsible for the payment of taxes on the estate's income earned postconfirmation. The Tenth Circuit, however, has held in In re Joplin, 882 F.2d 1507, 1510 (10th Cir. 1989), that:

> "26 U.S.C. Section 1(e) imposes a tax on the taxable income of -- (1) every estate...taxable under this subsection...,' Id. [Emphasis added],[3] ....26 U.S.C. Section 641(a) provides that the tax imposed by 26 U.S.C. Section 1(d) "shall apply to the taxable income of estates....'[4]"
>
> ---
>
> 3 26 U.S.C. Section 1(e) provides, in part, as follows:
>
> Estates and trusts.--There is hereby imposed on the taxable income of --
> (1) every estate, and
> (2) every trust,
> taxable under this subsection a tax determined in accordance with the following taxable....
>
> 4 26 U.S.C. Section 641(a) provides as follows:

[Footnote continued from previous page] already been decided previously or which are presently on appeal to the Eleventh Circuit, including appellants' arguments concerning the payment of income taxes."

> Imposition of tax
> (a) Application of tax.--The tax imposed by section 1(e) shall apply to the taxable income of estates or of any kind of property held in trust, including--
>
> (1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;
>
> (2) income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;
>
> (3) income received by estates of deceased persons during the period of administration or settlement of the estate; and
>
> (4) income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated. Id.

The historical precedent of the Supreme Court imposes a duty upon any person having possession of the proceeds of the sale of a debtor's property to satisfy any debt due

to the United States

prior to the use of those funds for the payment of claims of any other person.[21]

No court has relieved Theodore B. Gould of the statutory obligation to pay taxes on the income earned from the sale of the property of his individual estate. In fact, the Eleventh Circuit has held that the reorganized debtor "is responsible for such taxes." The positive language of the sections of the Internal Revenue Code, cited in Joplin, preclude Theodore B. Gould's payment of these funds to the liquidating trustee since such payment, with notice that the bankruptcy court's appointed agent is not responsible for satisfying the claims of the United States, could impose civil and criminal penalties on Theodore B. Gould.

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[21] See Lewis, Trustee v. United States, 92 U.S. 618, 622 (1875), citing Thelusson, et al. v. Smith, 2 Wheat. 396, 425 (1817).

For the foregoing reasons, Theodore B. Gould respectfully requests that this Court deny the bankruptcy court's order of contempt.

Respectfully submitted,

Theodore B. Gould, pro se
2568-D Ivy Road
Charlottesville, VA 22901
(804) 295-7125

FORM 4549 (REV 7/81) — DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE — INCOME TAX EXAMINATION CHANGES — Return Form No. 1120

Name and Address of Taxpayers
FRED STANTON SMITH acting on behalf of
HOLYWELL CORPORATION & SUBSIDIARIES
100 NORTH BISCAYNE BOULEVARD
MIAMI, FLORIDA 33132-2381

S.S. or E.I.N.: 52-1070235

Filing Status: CORPORATION

Person With Whom Changes Were Discussed:

1. ADJUSTMENTS TO INCOME:	Year: 07/31/86	Year: 07/31/87	Year: 07/31/88	Year: 07/31/89	Year: 07/31/90	Year: 07/31/91
A. TAXABLE INCOME BEFORE NET OPERATING LOSS DEDUCTION	60,786,153.00	471,122.00	817,368.00	967,235.00	2,383,863.00	(1,479,159.00)
B. NET OPERATING LOSS DEDUCTION	(14,270,398.00)		(817,368.00)	(240,849.00)		
C.						
D.						
E.						
2. TOTAL ADJUSTMENTS	46,515,755.00	471,122.00	0.00	726,386.00	2,383,863.00	0.00
3. TAXABLE INCOME PER RETURN	0.00	0.00	0.00	0.00	0.00	0.00
4. CORRECTED TAXABLE INCOME	46,515,755.00	471,122.00	0.00	726,386.00	2,383,863.00	0.00
5. TAX (From Page 2)	21,397,247.00	193,384.00	0.00	246,971.00	810,513.00	0.00
6. ALTERNATIVE TAX, IF APPLICABLE (From Page 10)	18,435,313.00					
7. CORRECTED TAX LIABILITY	18,435,313.00	193,384.00	0.00	246,971.00	810,513.00	0.00
8. LESS: CREDITS:						
A. INVESTMENT TAX CREDIT (Page 2)	987,667.00					
B. JOBS CREDIT (From Page _)						
C.						
9. BALANCE	17,447,646.00	193,384.00	0.00	246,971.00	810,513.00	0.00
10. PLUS:						
A. TAX FROM RECOMPUTING PRIOR YEAR IIC	529,286.00					
B. SELF-EMPLOYMENT TAX						
C. MINIMUM TAX (From Page 11.2)	1,168,006.00					
11. TOTAL CORRECTED TAX LIABILITY	19,144,938.00	193,384.00	0.00	246,971.00	810,513.00	0.00
12. TOTAL TAX AS PREVIOUSLY ADJ	0.00	0.00	0.00	0.00	0.00	0.00
13. DEFICIENCY (line 11-line 12)	19,144,938.00	193,384.00	0.00	246,971.00	810,513.00	0.00
14. OVERASSESSMENT (line 12-line 11)						
15. Adjustment to Prepayment Credits						
16. BALANCE DUE, Not including interest	19,144,938.00	193,384.00	0.00	246,971.00	810,513.00	0.00
17. OVERPAYMENT, Not including interest						
18. PENALTIES, IF ANY (see explanation)	5,743,481.00	58,015.00	0.00	12,349.00	162,103.00	0.00

Other Information

Refer to pages 12 through 31 for a comprehensive statement of the facts of this case.
Refer to pages 32 through 41 for a description of the principal issues of this case.

Examiner's Signature Exp. 1226 Date 07/13/92

FORM 886-A (Rev.May 1980)	Department of the Treasury Internal Revenue Service EXPLANATION OF ITEMS	Schedule No.or Exhibit
Name of Taxpayer FRED STANTON SMITH acting on behalf of HOLYWELL CORPORATION & SUBSIDIARIES		Year/Period Ended 07/31/85-07/31/91

ISSUE NO. 1:

Does the fact that various debtors are "substantively consolidated" in accordance with a plan of liquidation under chapter 11 of Title 11 of the United States Code affect the manner in which they are treated for income tax purposes?

FACTS:

This report is based on the theory that the debtors, (Miami Center Limited Partnership, Holywell Corporation, Miami Center Corporation, Chopin Associates and the Fiduciary Estate of Theodore B. Gould) retain their status as separate entities for tax purposes even though in accordance with the confirmed plan the bankruptcy estates of the debtors were substantively consolidated for administrative purposes under Chapter 11 of the Bankruptcy Code. See pages 12 through 31 for the facts related to this issue.

LAW & ARGUMENT:

There are no provisions under the Internal Revenue Code for the consolidation of an individual with a partnership or an individual with a corporation or a partnership with a corporation. These are separate and distinct entities for tax purposes, see section 7701(a) of the Internal Revenue Code.

Section 1399 of the Code provides that except for any case to which section 1398 applies no separate taxable entity shall result from the commencement of a case under title 11 of the United States Code. Section 1398 provides that in a case under chapter 7 or chapter 11 of title 11 of the United States Code in which the debtor is an individual a separate taxable entity is created. There are no provisions in the Code for the consolidation of this separate taxable entity with a partnership or a corporation.

CONCLUSION:

The substantive consolidation did not affect the status as a separate entity for tax purposes of the Estate of the Individual Debtor, Miami Center Limited Partnership, Chopin Associates, Holywell Corporation and Miami Center Corporation.

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Name of Taxpayer FRED STANTON SMITH acting on behalf of HOLYWELL CORPORATION & SUBSIDIARIES		Year/Period Ended 07/31/85-07/31/91

ISSUE NO. 2:

Upon the effective date of the Plan of Reorganization, was a separate taxable entity created with respect to the corporate debtors' property which was then responsible for reporting the income on the corporate debtors' property, or was the post-confirmation entity, with respect to the corporate debtors, considered a continuation of such corporate debtors with the Trustee being responsible for reporting the income on the property of such corporate debtors?

FACTS:

See pages 12 through 31 for the facts related to this issue.

LAW & ARGUMENT:

Section 6012(b)(3) of the Internal Revenue Code of 1986 provides:

> "In a case where a receiver, trustee in a case under title 11 of the United States Code or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns."

The Supreme Court in Holywell Corp. v. Smith, 503 U.S. _____, 112 S. Ct. 1021 (1992) declined to consider whether the trustee qualifies as a receiver or a trustee in a case under title 11 of the U.S. Code, therefore these are still unanswered questions. The Supreme Court did, however, conclude that the trustee is an "assignee" of the corporate debtors under Section 6012(b)(3). The Court further concluded that the trustee must pay the tax due on both the income attributable to the corporate debtors' property and the income attributable to the individual debtor's property. He must pay the tax on the income attributable to the corporate debtors' property because Section 6012(b)(3) requires him to make a return as the assignee of the property of the corporate debtors. He must pay the tax on the income attributable to the individual debtor's property because he is the fiduciary of a trust, (the Miami Center Liquidating Trust), in which was vested all the assets of the estate of the individual debtor.

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In it's opinion the Supreme Court stated: "The plan, as noted above, transferred the corporate debtor's estates to respondent Smith as trustee for the Miami Center Liquidating Trust." Treas. Reg. Sec. 1.641(b)-2(b) provides that:

> The estate of an infant, incompetent, or other person under a disability, or, in general, of an individual or corporation in receivership or a corporation in bankruptcy is not a taxable entity separate from the person for whom the fiduciary is acting, in that respect differing from the estate of a deceased person or of a trust. See section 6012(b)(2) and (3) for provisions relating to the obligation of the fiduciary with respect to returns of such persons.

In the words of the Supreme Court "As the assignee of "all" or "substantially all" of the property of the corporate debtors, the trustee must file the returns that the corporate debtors would have filed had the plan not assigned their property to the trustee."

The Court in Holywell specifically declined to consider whether the trustee would qualify as a receiver or a trustee in a case under title 11 because the parties did not argue that the tax treatment would differ under either of these characterizations from the "assignee" characterization. The language of section 6012(b)(3) of the Code indicates clearly that the tax treatment is identical regardless of which characterization applies. In Rev. Rul. 79-120, 1979-1 C.B. 382, the Service held that the bankruptcy trustee while acting on behalf of the estate of a bankrupt corporation does not represent a separate taxable entity apart from the corporation and any income or expenses of the trustee should be reported on the income tax return of the corporation. This position was codified in section 1399 which specifically provides that no separate taxable entity results from the commencement of a bankruptcy case involving a corporation. S. Rep. No. 1035, 96th Cong., 1st Sess. 25-26 (1980), 1980-2 C.B. 620, 633.

CONCLUSION:

With respect to the corporate debtors, no separate taxable entity was created by the confirmation of the plan of reorganization. The post-confirmation entity is to be treated as a continuation of each debtor corporation. The Trustee must file returns on behalf of the corporate debtors and include in those returns his income and expenses that apply to the corporate debtors.

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ISSUE NO. 3:

How should expenditures made for the payment of Miami Center Limited Partnership debts from the property of Holywell Corporation and the non-debtor subsidiaries be characterized, and are they allowable as deductions in computing the taxable income of Holywell Corporation and the non-debtor subsidiaries?

FACTS:

See pages 12 through 31 for the facts related to this issue.

LAW & ARGUMENT:

During the administration of the Miami Center Liquidating Trust a substantial amount of Miami Center Limited Partnership claims were paid with money obtained from Holywell Corporation and its non-debtor subsidiaries, (see Exhibit No. 16). This was accomplished because the Plan of Reorganization provided for the substantive consolidation of the debtors' estates. The Amended Confirmation Order, entered on January 26, 1986 stated:

> "For example (a) in due course, a creditor of MCLP could reach ...(iii) Holywell's assets (net of its liabilities) by levying upon Gould's ownership of 100% of the stock of Holywell..."

However, the creditors of Miami Center Limited Partnership were paid using Holywell's assets before all its liabilities were paid, such unpaid liabilities being the federal and state taxes.

In the oral argument before the Supreme Court, the Assistant to the Solicitor General, in response to a question by one of the Justices regarding what would be the effect on the general creditors if it was determined that the Trustee was liable for the taxes, made the following statement:

> "My assumption would be that somebody would have to return some money. The trustee has not retained sufficient funds to pay the taxes, so he would have to get it back.
>
> Now, as we know, he sought and obtained an indemnification from one of the major creditors at the time he became a trustee. He looked at the plan, and apparently it was visible to him, although not to anyone else, that there would be a substantial gain and therefore substantial income to be taxed.

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> Instead of going to court as he should have, according to this Court's decision in King v. United States, and told the bankruptcy court that there's a big tax obligation here, he went to the creditor who'd proposed the plan and he asked them for and received from them an indemnification if he should ever be held liable for taxes, ... or if I am liable the Bank of New York should pay me because they defrauded me and the estate by proposing a plan that didn't provide for these taxes. ... We anticipate that collection can occur through the moneys the trustee has and through the indemnification that the Bank of New York provided."

If in fact the Holywell and non-debtor subsidiary funds used to satisfy the claims of the MCLP creditors can be recovered then instead of being characterized as corporate distributions they should be characterized as misappropriated funds. Any amounts which are not returned should be characterized as corporate distributions.

Section 63 of the Internal Revenue Code of 1986 defines taxable income as gross income minus the deductions allowed by Chapter 1 (other than the standard deduction). Part VI of Subchapter B of Chapter 1 of the Code contains the sections that provide for itemized deductions for corporations. These deductions include trade or business expenses, interest, taxes, losses, bad debts, depreciation etc. Part VIII of Subchapter B of Chapter 1 contains sections that provide for special deductions for corporations. These deductions include various dividends received deductions and organizational expenditures. There is no provision in any section of Chapter 1 of the Code that allows a deduction for amounts used to satisfy the debts of another taxpayer.

There are specific provisions in the Code that disallow deductions for corporate distributions. Section 311 of the Code provides that no loss shall be recognized by a corporation on a distribution with respect to its stock. Section 361(c) of the Code provides that no loss shall be recognized by a corporation a party to a reorganization on the distribution to its shareholders of property in pursuance of the plan of reorganization.

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CONCLUSION:

To the extent the expenditures made from the property of Holywell Corporation and the non-debtor subsidiaries used to satisfy the debts of MCLP can be recovered they should be characterized as misappropriated funds. To the extent such funds are not recovered they should be characterized as corporate distributions. In either event the expenditure of such funds does not give rise to a deduction from gross income for Holywell Corporation or its non-debtor subsidiaries.

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ISSUE NO. 4:

Should the penalties for negligence and failure to file under sections 6653(a) 6662 and 6651(a)(1) of the Internal Revenue Code be assessed in this situation?

FACTS:

See pages 12 through 31 for the facts relating to this issue.

LAW & ARGUMENT:

For all income tax returns the due date for which is before January 1, 1990 section 6653(a) of the Internal Revenue Code imposes a penalty for negligence or intentional disregard of rules and regulations. Public Law 99-514 section 1503(a) amended Code Sec. 6653 by deleting the word "intentional" and adding paragraph (a)(3) which defines "negligence" to include any failure to make a reasonable attempt to comply with the provisions of this title, and "disregard" to include any careless, reckless, or intentional disregard. The penalty is 5 percent of the underpayment plus, (for returns due after December 31, 1981 and before January 1, 1989) 50 percent of the interest on the underpayment attributable to negligence. For a delinquent return the underpayment is equal to the total amount of the tax imposed by Subtitle A.

For all income tax returns the due date for which is after December 31, 1989 section 6662 of the Internal Revenue Code imposes a penalty for negligence or disregard of rules or regulations. Subsection (c) defines "negligence" and "disregard" just as paragraph (a)(3) of section 6653 did. The penalty is 20 percent of the portion of the underpayment to which the negligence applies.

In the case at issue the evidence strongly indicates that the Plan of Reorganization was calculated to avoid the payment of income tax. The debtors alleged fraud on the part of the Bank of New York but the courts refused to consider this issue. Despite the fact that the law is clear, (which is shown by the Supreme Courts unanimous decision) the Trustee refused to file returns and pay the tax.

..

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The following factors are evidence that the Plan was calculated to avoid the payment of income tax:

a) The fact that the Plan ignored the liability for the payment of income taxes.

b) The provision for the substantive consolidation of the Debtors' estates. The substantive consolidation merged the estates of the 5 debtors into a single estate creating a common pool of assets from which the claims were paid. This commingling of assets made it very difficult to prepare a return for the corporate debtor. There was no separate accounting for the corporate debtor's assets, liabilities, income or expenses by the Trustee. In fact the assets of a non-debtor subsidiary, (Twin Development Corporation) were also commingled with the debtors' assets.

c) One of the provisions of the Plan was the elimination of the claims of Holywell Telecommunications Company and Holywell Leasing Company. As of October 10, 1985 the total amount of rents due these two non-debtor subsidiaries of Holywell from Miami Center Limited Partnership was $3,315,672 plus interest. This was moneys that could of been used to help satisfy Holywell's tax liability.

d) The inclusion of the proceeds from the sale of the Washington Properties that included approximately $13,000,000.00 that belonged to Twin Development Corporation in the "Trust Property". Twin Development was a non-debtor subsidiary of Holywell and was severally liable for the taxes of the consolidated group.

e) The inclusion of the proceeds from the sale of the Washington Properties that included approximately $13,000,000.00 that belonged to Holywell Corporation in the "Trust Property". Holywell was a limited partner and guaranteed part of the loan from the Bank of New York that was satisfied by the sale. Holywell was not liable for the other claims.

f) The conveyance of the property of Holywell Telecommunications Company and Holywell Leasing Company to the designee of the Bank of New York without consideration. This further deprived the consolidated group of assets that could have been used to satisfy its tax liability. It also appears to be an attempt to create a taxable loss for the value of the property.

g) The fact that the Trustee waited over two years, at which time the plan was substantially consummated, before he brought an action in the bankruptcy court to determine the extent of his liability for the taxes of the debtors. That instead of going to court immediately the Trustee went to the Bank of New York, asked for, and received from them an indemnification.

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Section 6651(a)(1) of the Internal Revenue Code imposes a penalty for the failure to file a tax return on the date prescribed therefore unless such failure is do to reasonable cause and not willful neglect. The amount of the penalty is equal to 5 percent of the amount of tax required to be shown on such return for each month such failure continues to a maximum of 25 percent.

The court in In the Matter of I. J. Knight Realty Corp., 77-2 USTC par. 9536 stated:

> "A long line of cases holds that advice of reputable counsel that a taxpayer is not liable for certain tax or not required to file a return establishes that failure to file within the prescribed time is due to reasonable cause and not wilful neglect."

The first return for which the Trustee was liable to file was the return for Holywell's fiscal year ending July 31, 1985 which included the gains from the sale of the Washington Properties. The Trustee refused to file this return which was due on October 15, 1985. The next return for which the Trustee was liable to file was the return for Holywell's fiscal year ending July 31, 1986 which included the gain from the sale of the Miami Center. The Trustee refused to file this return which was due on October 15, 1986. The next return for which the Trustee was liable to file was the return for Holywell's fiscal year ending July 31, 1987. The Trustee refused to file this return which was due on October 12, 1987.

Instead of going to the court immediately upon his appointment to determine his responsibility for the federal taxes of the debtors he went to the Bank of New York, asked for, and received from them an indemnification against personal liability. The Trustee did not commence the proceeding in the bankruptcy court seeking a declaration that he was not required to file federal income tax returns until December 28, 1987. By this time the plan was substantially consummated and the funds remaining were not adequate to satisfy the tax liabilities. A ruling against the Trustee would mean that the plan was inadequate and in fact should not of been confirmed in the first place. The bankruptcy court ruled in favor of the Trustee on April 28, 1988, however the decision was clearly erroneous as is shown by the Supreme Court's unanimous decision. The evidence indicates that there was never any intent on the part of the Trustee to file any returns, that the Plan ignored this responsibility and in fact was designed to avoid the payment of income tax.

The Trustee may not assert the "reasonable cause" defense against the failure to file penalty for returns due before December 28, 1987 for the reasons stated above. For returns due after December 28, 1987 the Trustee may assert the

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"reasonable cause" defense since the question was then in the hands of the courts.

CONCLUSION:

The penalties for negligence and failure to file under sections 6653(a) and 6651(a)(1) of the Internal Revenue Code are applicable and should be assessed for the years ending July 31, 1985; July 31, 1986 and July 31, 1987. In addition the penalty for negligence under section 6653(a) is applicable and should be assessed for the years ending July 31, 1988 and July 31, 1989. The penalty for negligence under section 6662 is applicable and should be assessed for the years ending July 31, 1990 and July 31, 1991. However, note that no penalties will be assessed for years in which there is no deficiency.

Supreme Court, U.S.
FILED
DEC 31 1992
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(2)

No. 92-934

In The

Supreme Court of the United States

October Term, 1992

THEODORE B. GOULD,

Petitioner,

vs.

FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, AND THE BANK OF NEW YORK,

Respondents.

IN RE HOLYWELL CORP., THEODORE B. GOULD, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORP., AND CHOPIN ASSOCIATES,

Debtors.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT SMITH

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QUESTION PRESENTED

I.

Whether the Court of Appeals erred in affirming contempt orders entered by the courts below where there is no dispute that Petitioner diverted assets of the Miami Center Liquidating Trust to his personal use?

II.

Whether the Court of Appeals erred in affirming the sanctions imposed by the contempt orders entered by the courts below?

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OPINIONS BELOW

The opinions below include the unreported decision of the Court of Appeals (Pet. App. A at 1a); the unreported decision of the United States District Court for the Southern District of Florida (Pet. App. B at 11a); and the unreported decisions of the United States Bankruptcy Court for the Southern District of Florida, titled *Order Finding Theodore B. Gould In Contempt* (Pet. App. at 38a) and *Order Certifying Theodore B. Gould To Be In Contempt* (Pet. App. E at 45a).

STATEMENT OF JURISDICTION

The Petitioner seeks review of a decision by the Court of Appeals, *per curiam* and without decision,[1] which affirmed the lower court's finding of contempt resulting from the Petitioner's diversion of assets of the Miami Center Liquidating Trust (hereinafter "Trust") for his personal use. The Petitioner invokes 28 U.S.C. § 1254(1) to establish this Court's jurisdiction, but has failed to establish any jurisdictional basis for granting the petition for writ of certiorari. He has demonstrated neither the existence of a conflict between the decision of the Court of Appeals for the Eleventh Circuit and any decision of this Court or other Court of Appeals, nor has he demonstrated the existence of an important question of federal law which has not been, but should be settled by

[1] The decision reads "*PER CURIAM*: AFFIRMED. *See* 11th Cir. R. 36-1."

the Court. *See* Sup.Ct.R. 10.1(a)-(c). Accordingly, the petition should be denied.

STATEMENT OF THE CASE

Introduction

The Petitioner is one of five related debtors which he owns, controls and dominates.[2] Each filed simultaneous voluntary Chapter 11 petitions over eight years ago in the United States Bankruptcy Court for the Southern District of Florida. *See Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547, 1548 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988). This is the Petitioner's eleventh visit to this Court.[3]

After "overwhelming" approval by the creditors, on August 8, 1985 the bankruptcy court confirmed the plan of reorganization (hereinafter "Plan") proposed by the debtors' primary creditor, The Bank of New York, over the debtors' objections. *See Holywell Corp. v. Bank of New*

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[2] The debtors are Theodore B. Gould, Holywell Corp., Miami Center Liquidating Partnership, Miami Center Corporation and Chopin Associates.

[3] In addition to this effort to collaterally attack the confirmed plan of reorganization, the Petitioner has unsuccessfully sought review in nine out of his ten prior visits to this Court. *See* Nos. 87-1988, *cert. denied*, 488 U.S. 823 (1988); 87-1989, *Pet. for writ of mandamus denied*, 488 U.S. 814 (1988); 89-864, *cert. denied*, 110 S.Ct. 867 (1990); 89-708, *cert. denied*, 110 S.Ct. 725 (1990); 89-917, *cert. denied*, 110 S.Ct. 1119 (1990); 90-676, *cert. denied*, 111 S.Ct. 713 (1991); 90-761, *cert. denied*, 111 S.Ct. 767 (1991); 90-1551, *cert. denied*, 111 S.Ct. 2259 (1991). *But see Holywell v. Smith*, 112 S.Ct. 1021 (1992).

York, 59 Bankr. 340 (S.D. Fla. 1986). The Plan provided for the creation of the Miami Center Liquidating Trust (hereinafter "Trust"), consisting of all of the debtors' combined assets under 11 U.S.C. § 541(a), and the appointment of a trustee. By order dated August 12, 1985, the court appointed Respondent Smith, who had no prior connection with the debtors or the bankruptcy proceedings. Bankr. C.P. No. 916.[4] Smith's authority to act became effective on October 10, 1985, the date the Plan was implemented.

The Plan substantively consolidated all of the debtors' assets, and directed Smith to sell the largest asset, the Miami Center property, to The Bank of New York (hereinafter "Bank") for $255,600,000. The consideration took the form of cancellation of the Bank's claim (for approximately $242,000,000, including post-petition interest) plus cash. Following the debtors' failure to post a bond to stay implementation of the Plan, the sale of the Miami Center closed, and Smith commenced disbursements to allowed claims as directed by the Plan. *See* Bankr. C.P. No. 1086 and 1254 (First and Second Reports of the Liquidating Trustee, respectively).

Faced with the lack of a stay and the implementation and substantial consummation of the Plan, the debtors, including the Petitioner, were unsuccessful in their appeal of the bankruptcy court's order confirming the Plan. *See Holywell Corp. v. Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986), *dismissed as moot sub nom, Miami Center*

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[4] "Bankr. C.P. No. ___" refers to the court paper number assigned below.

Ltd. Partnership v. Bank of New York, 838 F.2d 12547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988).

Course of Proceedings

Smith filed a motion to have the Petitioner held in contempt for his unauthorized sale of Trust assets and for his refusal to reveal the whereabouts of or to turn over the sale proceeds. Pet. App. F at 48a.

The bankruptcy court found the Petitioner to be in contempt, required him to disgorge sale proceeds of $67,500 (together with interest, less $1,000 in closing expenses) by a date and time certain, and imposed a $1,000 daily fine should he fail to comply by the appointed time. Pet. App. D at 38a. The fine was payable to the court registry and was to continue until the order was obeyed. *Id.* The court reserved authority to impose further sanctions. *Id.* at 43a.

Following the Petitioner's failure to abide that order, the bankruptcy court certified to the district court that the Petitioner was in contempt. Pet. App. E at 45a.

The district court conducted a *de novo* hearing and entered an order finding the Petitioner in contempt and, like the court below, required him to turn over the sale proceeds. Pet. App. B at 11a. He was given seven days to comply, and was advised that his failure to do so would "result in the imposition of sanctions, including but not limited to a daily fine in the amount of $1,000" for each day until compliance. *Id.*

The district court denied rehearing and the Petitioner's request for a stay, specifically rejecting the relevance of the tax issues, ultimately decided in *Holywell Corp. v. Smith*, 503 U.S. ___, 112 S.Ct. 1021, 117 L.Ed. 2d 196 (1992), to the Petitioner's contumacious acts. Pet. App. C at 28a.[5]

The Court of Appeals affirmed *per curiam* without opinion, Pet. App. A at 1a, and denied rehearing, rehearing *en banc*, and a stay. Pet. App. A at 3a and 8a. This court summarily denied a stay. *Gould v. Smith*, No. 344 (Oct. 30, 1992).

Facts

The facts relevant to the petition, although not in dispute, are not completely or accurately set forth in the Petition.[6]

In October 1981, the Petitioner purchased certain concrete pumps and related equipment. Pet. App. B at 13a. Upon the filing of his Chapter 11 petition in 1985, the concrete pumps and related equipment became assets of his bankruptcy estate pursuant to 11 U.S.C. § 541(a). *Id.* Pursuant to the confirmed Plan, this property became

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[5] The Petitioner erroneously asserts that counsel for the Trustee drew the bankruptcy court's tax decision, ultimately reversed by this Court as cited above. This claim is not only untrue, but *dehors* the record. It should further be noted that Petitioner failed to preserve this "issue" in his appeal of the bankruptcy court's tax decision.

[6] The Petitioner's narrative is argumentative and replete with references to matters that are *dehors* the record, misleading, and irrelevant.

property of the Trust. *Id.* In 1989, the Petitioner was contacted by a purchaser for the concrete pumps and related equipment, but before the sale was consummated, the Petitioner was notified that Respondent Smith claimed the right to this property and any sale proceeds. *Id.* at 14a. He nonetheless contracted for the sale of the property without Smith's consent, and consummated the sale, accepted payment in his name alone, and placed the proceeds in a brokerage account which he refused to reveal. *Id.* He insisted the proceeds were to be used to satisfy taxes arising as a result of implementation of the Plan. App. A at 7, 9-10; Pet. App. C at 36a.

The bankruptcy court certified the Petitioner to be in contempt. Pet. App. E at 45a. Despite having acknowledged that the property belonged to the Trust, App. A at 6-7; B at 2, 10, the Petitioner objected to the contempt order on the ground that Respondent Smith lacked any interest in the property. Pet. App. G at 58a. He also objected on grounds that the bankruptcy court lacked jurisdiction to appoint Respondent Smith as trustee, that the Plan did not bind the Petitioner because it was "unlawful," and that the bankruptcy court lacked jurisdiction after confirmation. Pet. App. G at 57a. The Petitioner failed to raise any objection on the ground that the sanctions imposed were excessive.

At the *de novo* contempt hearing before the district court, the Petitioner stated that he would rely on the court papers and that oral argument or an evidentiary hearing were unnecessary because "[t]his is a symbolic gesture. I want to take this up to the Eleventh Circuit." App. C at 4. He also refused legal counsel. *Id.* at 5.

The district court held him in contempt, finding:

1. The concrete pumps and related equipment were assets of the Petitioner's bankruptcy estate pursuant to Bankruptcy Code Section 541(a), and thereafter became an asset of the Trust pursuant to the confirmed Plan.

2. The Petitioner sold the property in question without authority and refused to disgorge the proceeds.

3. The bankruptcy court had jurisdiction to appoint Smith as Trustee, and that appointment and the establishment of the Trust was the law of the case.

4. The issue of the Trust's responsibility for taxes incurred as a result of implementation of the Plan was addressed in a separate proceeding and was irrelevant to the issue of the Petitioner's conduct.

Pet. App. B at 11a. The court ordered him to turn over the sale proceeds within seven days to the Trustee, imposed a $1,000 daily fine payable to the court registry in order to coerce compliance, and reserved authority to impose additional sanctions. The Petitioner nonetheless refused to comply.

The Petitioner did not argue or offer evidence of an inability to comply at either contempt hearing. When the Petitioner sought rehearing in the district court, App.D, he revealed for the first time that the sale proceeds were no longer in a brokerage account and would not be "saved" to pay taxes, as he had told the bankruptcy court. Pet. App. C at 36a. He claimed he could not comply with the court's directive (and therefore should be

relieved of any duty to do so) because he allegedly used the sale proceeds to pay his attorney in the related tax proceeding. *Id.* App. D at 1. He failed to present any evidence to support this contention.

The district court denied rehearing and the request for a stay. Pet. App. C at 28a. The court determined, Pet. App. C at 31-32a, that the tax issue:

> lies outside the focus of the instant action and the May 17 Order of this Court. As we stated in our Order of May 17, 1991, '[t]he question of whether the trust must pay taxes is not relevant to the issue of ownership of the concrete pumps.' *Id.*, Order at 6. We did *not* premise our contempt order upon the bankruptcy court's 'agreement with the trustee that he is not responsible for the payment of federal income taxes.' [Gould's] Motion for Stay at 3. Nor did we hold that the bankruptcy court had so premised its certification of contempt. *Id.* Rather, we stated clearly and unambiguously that Appellant was to be held in contempt because 'Mr. Gould sold an asset of the Miami Center Liquidating Trust and pocketed the proceeds, without the consent of the Liquidating Trustee and in direct violation of a court order'. *See* Order of May 17, 1991 at 6.

Id. at 31a-32a.

The court rejected the Petitioner's reasoning in its entirety, Pet. App. C at 32a:

> Mr. Gould argues that if the Supreme Court reverses the Eleventh Circuit's determination that the Trust is not responsible for the claimed taxes, and if Mr. Gould then brings an action for breach of fiduciary duty against the Liquidating

> Trustee for not paying those taxes, and if Mr. Gould then obtains a judgment against the Liquidating Trustee, and if that judgment includes as damages Mr. Gould's attorney's fees in appealing the tax decision, then perhaps he could not be held in contempt for diverting trust proceeds and using the assets for his own purposes. Mr. Gould's argument is speculative and hypothetical. Moreover, even if he should prevail as to the tax matter, the underlying realities of the instant action remain the same: Mr. Gould sold a Trust asset, kept the proceeds, and took such action without the consent of the Liquidating Trustee and in direct violation of a court order. It is for these things that he was found in *civil* contempt of court and directed to comply. We have heard nothing new or different. . . .

The district court rejected the Petitioner's claim that he could not be held in contempt because he was unable to comply with the court's order, having allegedly used the money to pay his attorneys. The court noted his misrepresentations concerning the disposition of the sale proceeds, stating that his "representations conflict directly with those he made in proceedings before the bankruptcy court. . . . " *Id.* at 35a.

The Court of Appeals affirmed *per curiam*, citing only Rule 36-1 of the Rules of the United States Court of Appeals for the Eleventh Circuit. That rule provides the court may affirm an order without opinion when an opinion would have no precedential value and when, *inter alia*, the district court's judgment is based on findings of fact that are not clearly erroneous, is supported by the record, and has been entered without an error of law.

SUMMARY OF ARGUMENT

This proceeding involves a garden variety contempt mischaracterized by the Petitioner as a malevolent scheme to deprive him of a supposed right to take property of the Trust in utter disregard of judicial process. The Petitioner does not contest the facts which led to his contempt, nor does he present the Court with any recognized basis for granting review. The finding of contempt based on the Petitioner's undisputed misconduct is not ordinarily the basis for review in this Court, which does not grant certiorari to review findings of fact. After filing a voluntary Chapter 11 petition in the bankruptcy court, the Petitioner sold assets that no longer belonged to him, without authority, and pocketed the proceeds. He refused to say where the money was and would not obey a court order to turn it over. Only after two contempt hearings and the district court's affirmance of the contempt order did he claim he should be relieved of the duty to turn over the funds because the money had been spent on attorney's fees in a related proceeding in which he and the United States of America prevailed over the Respondents. He never, however, offered any evidence to support his belated claim of "inability to comply."

The Petitioner relies largely on this Court's tax decision and collateral attacks on the Plan as his defense. Any issue concerning the Court's tax decision in this case is irrelevant to the issue of contempt. Furthermore, any issues concerning the propriety of the confirmation of the Plan is no longer subject to review. These "issues" are red herrings.

The imposition of sanctions in this case was in conformance with the law. The monetary sanctions imposed were expressly designed to coerce compliance with a

valid order. The Petitioner's effort to invoke the Excessive Fines Clause of the Constitution is, therefore, without merit.

Supreme Court Rule 10 authorizes certiorari review where there is a demonstrable conflict between the Courts of Appeals or with a decision of the Court, or where there exists an important question of federal law which has not been, but should be settled by the Court. These considerations, "while neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons that will be considered." Sup.Ct.R. 10.1. The Petitioner's writ satisfies none of the requisites.

Accordingly, the writ should be denied.

ARGUMENT

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

The Petitioner has attempted to cloud this plain and simple contempt proceeding with collateral attacks on the confirmed and substantially consummated Plan, and by gratuitous, untruthful attacks on the Trustee and his counsel. This effort, however, fails to address the facts of the case and the law of contempt. None of the reasons stated warrant review by this Court.

A. PETITIONER MAY NOT COLLATERALLY ATTACK THE PLAN TO EVADE CONTEMPT

The Petitioner contests the Plan in an effort to evade the consequences of his misconduct. This is not his first

collateral attack, nor likely his last.[7] This effort fails because, as the district court noted below, the Plan has been confirmed and has been the law of this case since 1985. Pet. App. B at 17-18a. *See Holywell Corp. v. Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986), *dismissed as moot sub nom, Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988). The confirmation of the Plan is no longer subject to review. The Plan, moreover, is binding on the Petitioner. Pet. App. B at 18a. *See* 11 U.S.C.. § 1142.

Assuming *arguendo* the plan is flawed, *infra* at 13, a contempt proceeding nonetheless "does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience." *Maggio v. Zeitz*, 333 U.S. 56, 69 and 75, 68 S.Ct. 401, 75 L.Ed.2d 521 (1983). *United States v. Rylander*, 460 U.S. 752, 756-757, 103 S.Ct. 1548, 75 L.Ed.2d 521 (1983).

Accordingly, the Petitioner's collateral attack on the Plan fails.

1. The Tax Decision is Irrelevant

The Petitioner relies on this Court's tax decision in *Holywell Corp. v. Smith*, 503 U.S. ___, 112 S.Ct. 1021, 117 L.Ed.2d 196 (1992), to support his claim that the Plan does not bind him and that the Plan and Respondent's Smith's

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[7] *See n.* 3.

appointment was unlawful. This Court determined in its decision that the Trust is responsible for the tax consequences of the Plan, even though the Plan failed to provide for payment of any such taxes. *Holywell*, 112 S.Ct. 1021. The Court determined that the substantially consummated Plan was not binding on the federal government for tax purposes because 26 U.S.C. § 6012(b) imposes on the Trust an independent tax obligation.[8] As the lower court so aptly noted, the tax issue has nothing to do with the contempt proceeding against the Petitioner for his diversion of Trust assets to his personal use in violation of a court order. Pet. App. C at 21a.

Respondent Smith agrees that the failure of the Bank's Plan to address its tax consequences or to provide funds to satisfy tax liabilities is a flaw which may have prevented confirmation had such an objection been properly raised.[9] That is why in the bankruptcy court adversary complaint filed in 1987, Smith sought to obtain a declaratory judgment of his tax obligations. He included in that complaint a claim against The Bank of New York, as the Plan's proponent, in the event the Trust was deemed responsible for taxes. As the Petitioner notes, the district court has not scheduled remand proceedings on

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[8] The Petitioner misstates the scope of the Court's tax decision. A plain reading demonstrates the Court did not address any alleged breach of duty by Respondent Smith, and that "issue" was not before the Court. Nor did the Court rule that the tax authorities would be entitled to seize the accounts of the Trustee, his counsel and his accountants. The Petitioner's gratuitous commentary are part and parcel of his *in terrorem* tactics.

[9] Respondent Smith was a stranger to the bankruptcy proceedings prior to confirmation of the Bank's Plan.

Respondent Smith's remaining claims against the Bank.[10] The Petitioner, however, fails to demonstrate how the Court's tax decision is relevant to the contempt proceedings.

B. THE LOWER COURT HAD JURISDICTION TO HOLD THE PETITIONER IN CONTEMPT

The lower court's jurisdiction in this matter is beyond dispute. The Bankruptcy Code, decisional law, and the Plan itself grant the bankruptcy court continuing jurisdiction post-confirmation over matters concerning implementation and execution of the Plan. Pet. App. B at 16-18a; *See* 11 U.S.C. § 1142(b); *Goodman v. Phillip R. Curtis Enters., Inc. (In re Goodman)*, 809 F.2d 228 (4th Cir. 1970); *Harlow v. Palouse Producers, Inc.*, 56 Bankr. 794 (9th Cir. B.A.P. 1985).

C. THE LOWER COURT'S FINDINGS OF FACT WERE NOT CLEARLY ERRONEOUS

The Petitioner cannot and does not genuinely contest the findings of fact which led to the contempt orders entered below. He admitted he sold Trust assets without authority and diverted the sale proceeds to his personal use. He has defied two orders directing him to return these proceeds. This Court does not grant certiorari to review findings of fact. *See Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); *Berenyi v. District*

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[10] In the tax proceedings, the lower courts did not address the Trustee's claims against the Bank because they ruled the Trust had no tax responsibility.

Director, Immigration and Naturalization Service, 385 U.S. 630, 87 S.Ct. 666, 17 L.Ed.2d 656 (1967); *N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 71 S.Ct. 453, 95 L.Ed. 479 (1951).[11]

D. THE LAW ON CONTEMPT WAS PROPERLY APPLIED

The lower courts properly applied the law of contempt to the facts in this case. The misappropriation of Trust assets is itself contemptuous. *See Wolfe v. Coleman*, 681 F.2d 1302 (11th Cir. 1982). The refusal and failure to comply with the lower courts' orders to turn over the sales proceeds is an additional contempt. *See Maness v. Meyers*, 419 U.S. 449 (1984); *Lindsey v. Ipack*, 732 F.2d 619 (8th Cir. 1984). It is not disputed that all federal courts have the power to impose sanctions against recalcitrant parties, *see Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440,

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[11] The Petitioner seeks review on the ground that, *inter alia*, the Trustee's counsel drew the bankruptcy court's contempt order. This argument lacks merit. He failed to raise this issue on appeal to the district court and is precluded from doing so now. *See Martinez v. Matthews*, 544 F.2d 1233 (5th Cir. 1976); *Pierre v. United States*, 525 F.2d 933 (5th Cir. 1976). At the *de novo* hearing in the district court, the Petitioner not only failed to raise the issue, but failed to present any evidence that the bankruptcy court did not independently review the proposed order. The procedure utilized below is neither suspect nor invalid. *See Anderson v. Bessemer City*, 470 U.S. 564 (1985). This argument is further weakened by the fact that Petitioner stipulated to the facts contained in the order, App. A; B, the order entirely comports with the bankruptcy court's oral ruling at the hearing, App. B at 11-13, and the district court affirmed after a *de novo* hearing in its own lengthy order. The Petitioner's argument thus lacks merit.

1447 (11th Cir. 1985), and that an order *must* be obeyed until it is reversed. *See Maness, supra.* In *Maness v. Meyers,*[12] Chief Justice Burger opined:

> We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a person believes an order is incorrect the remedy is to appeal, but absent a stay he must promptly comply with an order pending appeal- . . . . the orderly administration of justice by the courts requires that an order issued by the court . . . . must be obeyed until it is reversed by orderly and proper proceedings.

The Petitioner did not comply; he did not obtain a stay; and the order is valid. Under these circumstances, the propriety of the contempt order cannot be disputed.

1. Self-Created Inability to Comply Offers No Defense to Contempt

The Petitioner nonetheless argues that the contempt orders conflict with *United States v. Rylander,* 460 U.S. 752, 103 S.Ct. 1548, 75 L.Ed.2d 521 (1983), and *Donovan v. Mazzola,* 761 F. 2d 1411 (9th Cir. 1985), because the lower courts failed to consider that his inability to comply is a "complete defense." Pet. at 63. The Petitioner misstates the law and how it was applied in this case.

While inability to comply with a court order may sometimes be a defense to a contempt proceeding,[13] it

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[12] 419 U.S. at 458-459, 95 S.Ct. at 591.

[13] *See Rylander, supra; Maggio v. Zeitz,* 333 U.S. 56, 68 S.Ct. 401, 92 L.Ed.2d 476 (1948); *Pesaplastic, C.A. v. Cincinnati Milacron Co.,* 799 F. 2d 1510 (11th Cir. 1986).

does not preclude a finding of contempt when, as here, a contemnor has created the inability to comply himself. *See Piambino v. Bestline Products, Inc.*, 645 F.Supp. 1210 (S. D. Fla. 1986). Inability to comply with a court order *must* be established at the contempt hearing, *Piambino, supra,* and a contemnor *must* demonstrate that he has done his "utmost to comply." *See Phoenix Marine Enterprises, Inc. v. One (1) Hylas 46' Convertible Sportsfisherman Hull No. 1,* 681 F. Supp. 1523 (S.D. Fla.), *aff'd,* 846 F.2d 753 (11th Cir. 1988).

The undisputed record demonstrates that the Petitioner made no effort to comply with the courts' orders, and failed to offer any evidence of his alleged inability to comply. While a contemnor may assert a present inability to comply, it is the contemnor's burden to produce evidence to support the claim. *See Rylander,* 460 U.S. at 757; *McPhaul v. United States,* 364 U.S. 372, 379, 81 S.Ct. 138, 5 L.Ed.2d 136, (1960); *Maggio v. Zeitz,* 333 U.S. at 75-76; *Oriel v. Russell,* 278 U.S. 358, 366, 49 S.Ct. 173, 73 L.Ed. 419 (1929). The Petitioner failed to submit any evidence that would support his new defense. Moreover, the Petitioner failed to even raise this defense until after the district court affirmed the contempt order. Evidence (as opposed to a bare assertion) of inability to comply must be presented at the time of the contempt hearing. *See Rylander,* 460 U.S. at 757, 760-761. Under these circumstances, there is no conflict with *Rylander, Maggio,* or *Donovan,* and the Court of Appeals did not err in affirming the contempt order.

E. THE SANCTIONS IMPOSED ARE IN CONFORMANCE WITH THE LAW

The Petitioner misreads controlling decisional law concerning the sanctions imposed. Civil contempt sanctions may be imposed to coerce compliance with a court order and to compensate the claimant for actual losses sustained as a result of a contemnor's actions. *See United States v. United Mine Workers of America*, 330 U.S. 258 (1947); *Granfinanciera, S.A. v. Nordberg (In re Chase & Sanborn Corp.)*, 872 F. 2d 397, 400-401 (11th Cir. 1988).

A coercive fine such as in this case was properly required to be paid into the court registry. *United Mine Workers*, 330 U.S. at 304. The $1,000 daily fine was imposed after considering the magnitude of the harm threatened by the Petitioner's continued contumacy and the probable effectiveness of the sanction in bringing about the desired result. *See United Mine Workers*, 330 U.S. at 304.

The district court's imposition of sanctions fully complies with the guidelines in *United Mine Workers*. The court ordered the Petitioner to comply with the bankruptcy court's order by directing him to turn over the $67,500 received from the sale of the concrete pumps and related equipment, together with any interest earned on or since the time of the sale, less $1,000 in expenses incurred in consummating the sale. The court gave him seven days to comply, stating that his failure to do so "shall result in the imposition of sanctions including, but not limited to, a daily fine in the amount of $1,000 per day for each day Mr. Gould may fail to comply." Pet. App. B at 26-27a.

In following the directive to "consider the character and magnitude of the harm threatened by the contumacy, and the probable effectiveness of any suggested sanction bringing about the result desired," *Chase*, 872 F. 2d at 401, the lower courts noted the Petitioner's intentional misappropriation of trust assets, his refusal to reveal the whereabouts of the sale proceeds, his misrepresentations concerning the disposition of the sale proceeds, his overt disrespect for the judicial process, and his frustration of the Trustee's ability to perform the duties of the Trust.

In imposing contempt sanctions, a court should select the least possible power adequate to obtain the desired result. *See Spallone v. United States*, 493 U.S. 265, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990). It can safely be surmised that a reasonable person would comply with a directive to turn over $67,500 rather than face a $1,000 daily fine. But then, a reasonable person would not have misappropriated the funds in the first place.

Accordingly, the sanctions imposed conform with the law and there is no violation (let alone applicability) of Amendment VIII to the Constitution.

CONCLUSION

For all of the foregoing reasons, the writ should be denied.

Respectfully submitted,

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APPENDIX A

[p. 1] THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 84-01590/91/92/93/94-BKC-SMW

IN RE:
HOLYWELL CORPORATION, et al.,
debtors.

One S.E. 3rd Avenue
Miami, Florida
Thursday, July 19, 1989
1:10 P.M. – 1:25 P.M.

DEPOSITION OF THEODORE GOULD

Taken before ELLIOTT MARSHALL, A.S., Registered Professional Reporter and Notary Public in and for the State of Florida at Large, pursuant to Notice of Taking Deposition in the above cause.

[p. 2] – APPEARANCES –

On behalf of the Liquidating Trustee

HERBERT STETTIN, ESQ., of the firm of STETTIN & STETTIN

On behalf of the debtors

Pro Se

On behalf of the Bank of New York

HARVY ZIEGLER, ESQ., of the firm of KIRKPATRICK & LOCKHART
and

VANCE SALTER and
KATHRYN HEISE,
ATTORNEYS AT LAW, of the firm of
COLL, DAVIDSON, CARTER,
SMITH, SALTER & BARKETT

ALSO PRESENT

Fred Stanton Smith

Randolph Segal

- INDEX -

WITNESS	DIRECT	CROSS
THEODORE GOULD		
BY MR. STETTIN	3	-

- EXHIBITS -

TRUSTEE'S	FOR IDENTIFICATION
Comp. No. 1	4
No. 2	10
No. 3	12

[p. 3] Thereupon -

THEODORE GOULD

was called as a witness by the Liquidating Trustee and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STETTIN:

Q. Mr. Gould, let's talk about the concrete pumps. Would you tell me, please, sir, when those pumps were acquired?

A. I believe I purchased them in 1981, perhaps late 1980.

Q. Let me show you what appears to be an invoice from Morse Diesel, Inc., to your attention, on behalf of Miami Center Limited Partnership, dated July 3, 1981, a billing from Diesel Construction, a division of Morse Diesel, Inc., and what looks to be a photocopy of a check issued by you in payment of those bills, and ask you if you recognize them (Handing).

A. (Witness examines documents.)

Yes, I recognize them.

Q. In fact, do they represent the purchase documents showing that you bought those concrete pumps back in 1981?

[p. 4] A. Yes.

MR. STETTIN: Mark them as Trustee's Composite Number 1 today, Marshall.

(Thereupon, the documents referred to was marked as Trustee's Composite Exhibit 1 for Identification.)

BY MR. STETTIN:

Q. Thereafter, after the Chapter 11 proceeding was filed, and after the Order of confirmation became effective, what became of those concrete pumps, sir?

A. Well –

Q. I'll break it down.

Were these concrete pumps used in the business of Holywell Corporation in the Miami Center prior to the filing of the bankruptcy?

A. Yes.

Q. And were they used to complete whatever work was required during the pendency of the Chapter 11 proceedings?

A. No.

Q. Were they stored during that period of time?

A. Yes.

Q. Where?

[p. 5] A. They were initially stored on the – what is referred to as the condo parcel, which is the Worth – sometimes referred to as the Worth property. Since Worth never had anything to do with it, Miami Center's Joint Venture property.

Q. Did the pumps remain there until they were disposed of earlier this year?

A. No. Sometime in 1987, I believe, or perhaps 1986 – I don't really recall – they were placed in an area that represents an easemnent between Phase I and Phase II.

Is that right next door, abutting the Miami Center property?

A. It's property abutting the joint venture property. Yes.

Q. Did there come a time early in the year 1989 when efforts were made to sell those concrete pumps?

A. I don't recall when. My – I wouldn't say it was early in the year.

My recollection is that I received a telephone call from a Larry McMillan in June or perhaps it was late May of 1989.

Q. What was the purpose of the call?

A. He asked if I owned the pumps. I said I [p. 6] did. All right? He asked me if I was willing to sell the pumps pumps. I said I was. He asked me what the price was; I said it was $75,000. He came up with a slightly lower price, we split the difference, and I agreed to sell him the pumps for $67,500. All right?

Q. Were you notified, prior to the time that the sale was consummated, that Fred Stanton Smith, as liquidating trustee, was claiming the right to the pumps or proceeds from the sale of the pumps?

A. No.

Q. Are you saying that no one notified you, neither Mr. McMillan nor anyone else, that there was a question raised by Fred Smith about his ownership of those pumps?

A. Excuse me. McMillan's attorney, in an indirect communication, informed me that he would like to place the funds in escrow.

Q. Is that a man named Lotspeich?

A. I don't know. I never spoke to him.

Q. Did he say why he wanted to put the funds in escrow?

A. He said he had spoken – again, this is hearsay; all right? but my understanding is that he had spoken to you, and that you had indicated that [p. 7] the trustee claimed title to the pumps.

Q. What did you say to Mr. Lotspeich? That's the name of the gentleman.

A. I didn't speak to Mr. Lotspeich. I had no contact with Mr. Lotspeich.

Q. Who did you speak to?

A. Mr. McMillan.

Q. What did you say to Mr. McMillan concerning the request to put the money from the purchase in escrow?

A. No deal.

Q. Why?

A. Why?

Q. Yes, sir.

A. Because the trust has been formed for unlawful purposes – all right? – to avoid the payment of Federal and State income taxes.

The $67,500 represents taxable income to my bankruptcy estate for the year 1989; okay? And if I allowed the funds to be placed in what I consider an unlawful trust, they would perhaps be used for other purposes. All right?

And clearly, they – the first thing that has to be done with those funds is pay the income taxes related to that taxable income.

[p. 8] Q. Will you agree with me that those concrete pumps were a part of your Chapter 11 estate on the filing of the Chapter 11 proceedings?

A. There's no question about that. And I do not deny it. And the proceeds, the $67,500, less the net $1,000 in expenses that I paid to give McMillan and his associates access to the pumps, so that they could view them and then later on remove them, represent part of my bankruptcy estate, as opposed to assets that are properly belonging to me as a discharged debtor.

Q. Did you insist to Mr. McMillan that unless the checks were payable to you, and you only, that you would not authorize the sale and would not permit those pumps to be sold?

A. I don't think that issue ever arose. I don't think the question of whether the check was made payable solely to me had arisen.

I think the question that arose was whether I would agree to place the funds in escrow; all right? And I said no.

Q. Did you receive the proceeds in the form of a cashier's check for $67,500, payable to you only?

A. Yes.

[p. 9] Q. Let me show you a customer copy portion of the check and ask you if that refreshes your memory.

Is that a copy of the cashier's check that you got?

A. Well, it's not a question of refreshing my memory. I already answered yes, I did receive it as a cashier's check, and I presume that this is the check itself.

Q. It's the customer portion of it.

A. Okay. There should be – the customer portion?

Q. Yes. It's the second copy of the cashier's check. The bank gets the original.

A. Okay. Well, they should have – obviously, the bank should have something upon which this check was drawn – an executed check with my name on it.

Q. I agree. Did you get this check, the original of the check, and keep the proceeds from it?

A. The proceeds have been invested. Yes.

Q. I'll get to that.

A. Less the $1,000.

MR. STETTIN: I'll get to that. Mark the [p. 10] check as Trustee 2.

(Thereupon, the document referred to was marked as Trustee's Exhibit 2 For Identification.)

BY MR. STETTIN:

Q. Where is the $67,500, less the thousand dollars, presently?

A. Invested in GMAC 30-day paper at 9.21% interest.

Q. In whose name is the account held?

A. In my name.

Q. At which brokerage firm?

A. At this stage, since I don't think that you have any business knowing, since my position is that you represent a trustee who has been unlawfully appointed for the purpose of avoiding the payment of taxes, I'm not going to tell you.

Q. If ordered by the Court to turn it over, will you turn it over?

A. No.

Q. Let me show you a copy of the agreement dated June 2, 1989 between yourself –

A. Before we do that, let me finish.

Q. Yes, sir.

A. Okay? If ordered by the Court to turn it [p. 11] over, or a sanction is imposed upon me for not turning it over, I will not turn it over because my good friends here, and perhaps you too, or maybe even the Court, would then moot – or demand that the Court to which we appeal – to which I appealed Judge Weaver's decision – moot the appeal. And the Court above would have to do that on the grounds that it lacked jurisdiction, since there would be no dispute, no controversy.

So I will not turn over the funds until there is a resolution of the trustee's responsibility for the payment of income taxes for the bankruptcy estate, since I consider Judge Weaver's decision with respect to the income taxes,

that is the trustee's lack of responsibility – I consider that null and void.

Q. Let me show you this agreement dated June 2, 1989, between yourself as seller and Lawrence G. McMillan, trustee, as purchaser. This one is signed by Mr. McMillan. And I ask you, is this a copy of the original which you did sign?

A. (Witness examines documents.) You know –

Q. Off the record for a minute.

MR. STETTIN: I will withdraw the last question.

[p. 12] BY MR. STETTIN:

Q. Is the copy of the agreement of June 2, 1989, attached to your Answer to Motion for Contempt and other relief, a true copy of the agreement signed between you and McMillan for the purchase of these concrete pumps?

A. Yes, it is.

MR. STETTIN: Mark it as 3. You can do it when we get a chance.

I don't have anything further to ask on direct examination.

(Thereupon, the document referred to was marked as Trustee's Exhibit 3 For Identification.)

THE WITNESS: I have no cross-examination.

MR. STETTIN: Do you waive the reading and signing?

THE WITNESS: I waive the reading and signing.

CERTIFICATE OF REPORTER

STATE OF FLORIDA :
: SS.
COUNTY OF DADE :

I, ELLIOTT MARSHALL, A.S., being a Registered Professional Reporter and Notary Public in and for the State of Florida at Large, do hereby certify that I reported the deposition of Theodore Gould, a witness called by the Liquidating Trustee in the above-styled cause; that the said witness was duly sworn by me; that the reading and subscribing of said deposition were waived by the witness and by counsel for the respective parties; and that the foregoing pages, numbered from 1 to 10, inclusive, constitute a true and correct transcription of my shorthand report of the deposition by said witness.

I further certify that I am not an attorney or counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter.

WITNESS my hand and official seal in the City of Miami, County of Dade, State of Florida, this 24th day of July 1989.

/s/ Elliott Marshall
Notary Public in and for
the State of Florida at large

My Commission Expires
September 17, 1992

APPENDIX B

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
Judge Sidney M. Weaver

In the Matter of:

HOLYWELL CORPORATION, Debtor. Case No. 84-01590-BKC-SMW

_____X

APPLICATION OF FRED STANTON SMITH, TRUSTEE, OF THE MIAMI CENTER LIQUIDATING TRUST, FOR INTERIM COMPENSATION AND REIMBURSEMENT OF EXPENSES; MOTION FOR DETERMINATION OF RIGHT TO AND AMOUNT OF ADMINISTRATIVE EXPENSES CLAIMED BY TURNER CONSTRUCTION COMPANY; MOTION FOR CONTEMPT and FINAL EVIDENTIARY HEARING RE: REMAND FROM U.S.D.C. (ADVERSARY CASE #84-01590-BKC-SMW-A)

July 27, 1989

The above-entitled cause came on for hearing before the HONORABLE SIDNEY M. WEAVER, one of the Judges of the UNITED STATES BANKRUPTCY COURT, in and for the SOUTHERN DISTRICT OF FLORIDA, at 51 Southwest 1st Avenue, Miami, Dade County, Florida, on Thursday, July 27, 1989, commencing at or about 1:30 p.m., and the following proceedings were had:

REPORTED BY: Jaclyn M. Ouellette

* * *

number. We are going to handle this, assuming it can be resolved, the way we did the ad valorem taxes. That is, the liquidating trustee will make a presentation and a

series of representations to the Court on why he believes it's a settlement in the best interest of the trust, Mr. Gould is going to be free to put on whatever testimony or evidence or argument he feels is appropriate as to why it is not, and the Court will then make its own determination again.

If that is acceptable to the Court, we would ask that you set it over until next week.

THE COURT: Let me find out what dates I have.

MR. STETTIN: Yes, sir.

THE COURT: While we're doing that, let's go on with the other matter.

MR. STETTIN: The one remaining matter that we have set for hearing today, Your Honor, is called the concrete pumps matter.

I'll give you the background, Judge. You entered an order based on that motion setting the matter for hearing today on the following facts.

Sometime prior to the filing of the petition initiating these proceedings, sometime back I believe in 1981, Mr. Gould individually purchased concrete pumps and some related equipment for some just under $500,000. Those concrete pumps were used in the operations of the Debtors prior to bankruptcy.

At the time of the filing of the petition initiating the proceedings, Mr. Gould's Chapter 11, those pumps, the property in question, became part of his estate under Section 541(a).

After confirmation, those pumps remained on the Miami Center premises at various locations, sometimes stored nearby, sometimes stored right next to.

Earlier this year, an opportunity to sell those pumps arose. The Court will recall under the terms of the plan of reorganization, all of the Debtors' 541(a) property, all of it, became property of the liquidating trust. Those concrete pumps and related equipment became part of the liquidating trust.

That was in '85. In 1989, Mr. Gould was approached by someone, a man named Larry McMillan from Kansas City with an offer to buy those pumps. Mr. Gould was advised before the sale was consummated that the liquidating trustee claimed the right to receive the proceeds. The price was $67,500, it was a negotiated sum and that was the number agreed upon.

Mr. Gould knew before he consummated the sale that the liquidating trustee wanted the monies paid to the liquidating trust. As a matter of fact, there was even – there will be some testimony if needed to the fact that what we did was we agreed we'd put the money in escrow and let the Court make the determination.

Mr. Gould said no, no sale will occur unless I sell the pumps. He did. On June 1st or June 2nd, the pumps were sold.

THE COURT: Just one moment, please.

(Off the Record.)

THE COURT: Is Tuesday afternoon too short?

MR. STETTIN: No, it isn't, Judge, if we can do it this way. If we have a deal it's easy, it seems to me. We can do it in an hour on Tuesday afternoon. If we don't have a deal, then it's a full blown trial and what will [sic] do is simply announce it and you will pick another trial date.

THE COURT: I have all Tuesday afternoon.

Are you going to be ready for trial on Tuesday?

MR. ZIEGLER: Yes.

MR. STETTIN: Good.

THE COURT: All right.

MR. STETTIN: Tuesday afternoon at what time, sir?

THE COURT: Mr. Gould?

MR. GOULD: Mr. Stettin is conducting the trial, so unless they agree to the settlement –

THE COURT: All right, Tuesday afternoon, then, at 1:30.

MR. STETTIN: Yes, sir.

THE COURT: This is the remand, right?

MR. STETTIN: Yes, sir.

THE COURT: Will you draw me an order, then, just to clear up the record?

MR. STETTIN: I will.

THE COURT: You all come in in any event whether it's settled or we will go to trial. All right.

Proceed, then.

MR. STETTIN: A contract for the purchase and sale of those units, the concrete pumps, was signed by the parties dated June 2nd, 1989. A cashier's check for $67,500 was drawn payable to Mr. Gould and received by Mr. Gould.

Mr. Gould had his deposition taken by me after we learned of all of this and filed this motion for contempt and I made demand on Mr. Gould to turn the money over and Mr. Gould refused to. I asked Mr. Gould where the money was.

Well, let me read just very brief selected portions of his deposition. This is Mr. Gould's deposition, Page 7:

"Q. What did you say to Mr. McMillan concerning the request to put the money from the purchase into escrow?

"A. No deal.

"Q. Why?

"A. Why?

"Q. Yes, sir.

"A. Because the trust has been formed for unlawful purposes, all right, to avoid the payment of federal and state income taxes.

Page 8:

"Q. Will you agree with me that those concrete pumps were a part of your Chapter 11 estate on the filing of the Chapter 11 proceeding?

"A. There is no question about that and I do not deny it and the proceeds, the $67,500,

less the $1,000 in expenses that I paid to give McMillan and his associates access to the pumps so that they could view them and then later on remove them, represent part of my bankruptcy estate as opposed to assets that are property belonging to me as a discharged Debtor."

He continued:

"I think the question that arose was whether I would place, agree to place the funds in escrow, all right, and I said no.

"Q. Did you receive the proceeds in the form of a cashiers check for $67,500, payable to you only?

"A. Yes.

"Q. Did you keep the proceeds?"

Page 10:

"A. The proceeds have been invested.

"Q. Where is the $67,500 less the thousand dollars present?

"A. Invested in GMAC 30 day paper at 9.21 percent interest.

"Q. In whose name is the account held?

"A. In my name.

"Q. At which brokerage firm?

"A. At this stage, since I don't think that you have any business knowing, since my Position is that you represent a trustee who has been unlawfully appointed for the purpose of avoiding the payment of taxes, I'm not going to tell you.

"Q. If ordered by the Court to turn it over, will you turn it over?

"A. No.

He continued:

"Before we do that, let me finish."

This is Mr. Gould.

"Q. Yes, sir.

"A. Okay, if ordered by the Court to turn it over or a sanction is imposed upon me for not turning it over, I will not turn it over because my good friends here" –

Pointing to Mr. Salter and Mr. Ziegler.

"and perhaps you, too, or maybe even the Court, would then moot or demand that the Court to which we appeal, to which I appeal Judge Weaver's decision, moot the appeal and the Court above would have to do that on the ground that it lacked jurisdiction since there would be no dispute, no controversy, so I will not turn over the funds until there is a resolution of the trustee's responsibility for the payment of income taxes for the bankruptcy estate since I considered Judge Weaver's decision with respect to the income taxes, that is the Trustee's lack of responsibility, I consider that null and void."

Now, I can go on, Judge, but the substance of it is I don't think we have any dispute as to facts. We have property that belonged to the Debtor's estate at the filing of the 11. By the terms of the plan it became part of the liquidating trust.

The Debtor, after discharge, knowingly and willfully sold that property knowing that the trust wanted the money, the proceeds from it and he refused to turn it over. To compound it, not only did he take property which he knew belonged to the liquidating trust, he now will not tell us where it is and he has announced in advance that he will not abide your order because you have made a ruling on the income tax decision which he considers to be null and void.

With due respect, Judge, that is contemptuous behavior. I will proffer for the Court that I have evidence as to every one of these items. I think I have read Mr. Gould's deposition and I will make all of these a part of the record. I have taken the deposition of the lawyer for Mr. McMillan, Brad Lockspeech (phonetic), I have taken the deposition of the lawyer who represented Mr. Gould, a man named Ethan Ninsky (phonetic), and I have the documents marked in every one of those depositions. They all say the same thing. Mr. Gould knowingly and willfully took property belonging to the liquidating trust and sold it and refuses to account for the money and will not abide by this Court's order, he says.

MR. GOULD: I just want to add one thing.

The $67,500 represents interest, taxable interest income for the year 1989, in my bankruptcy estate. You have reached the decision that the trustee is not responsible for the payment of federal and state income taxes.

You have not decided who is liable, who is responsible for filing the returns or paying the taxes. If in fact Judge Kehoe affirms your decision, and I give the $67,500 less the $1,000 plus interest, it's now $68,000, actually, to

the trustee and he uses it for the payment of pre-petition claims or for the administrative expenses of the trust, then I'll be responsible, I have a fiduciary responsibility to pay the income taxes associated with that in 1989.

What Mr. Stettin is asking me to do and what you would be asking me to do is to turn over these assets and then not have the funds to pay statutory tax liabilities. I believe that I have the responsibility to insure that the funds are available for the payment of the taxes.

That's my position. It's as simple as that.

Now, there is no question that the trust was created for the purpose of avoiding the payment of taxes. The bank has conceded that.

What you have done, I regret to say, is that you have placed me in the position, and it's very awkward for me, I have the responsibility, if the trustee does not, to file the returns. If I file the return, or when I file the return, I have to pay the taxes.

If your order is affirmed, as you recall, all you have done is you have relieved the trustee of the responsibility for filing returns and paying the taxes. If somebody can explain to me how I can turn the funds over and be discharged of any tax liability and any responsibility to file the return for 1989, I would be very happy to do that.

So far, nobody has done that. All they have done is say give me the asset. We are not responsible for the liabilities associated with it, just give me the assets.

I think there is something wrong with that and I'm afraid I can't do that.

Thank you.

MR. SALTER: Just to correct one point in Mr. Gould's presentation, Your Honor.

The bank has never conceded that the plan or the trust was created to evade any tax liability whatsoever. We would differ with that. I didn't want to remain silent.

Otherwise, Your Honor, we support the liquidating trustee's position.

MR STETTIN: Since I don't believe any evidence needs to be taken because we have a stipulated set of facts, Judge, I think I am going to need an agreement from Mr. Gould that the recitation of facts which I made in my opening statement to you is correct and can form the basis of any record that the Court needs for its further handling of this case.

THE COURT: Do you find any fault with Mr. Stettin's presentation?

MR. GOULD: No, just to the extent that it's necessary to attribute – to characterize these funds as being taxable income of my bankruptcy estate.

MR. STETTIN: I don't think that is necessary for the determination that I wish the court to make. I will say it's property of his estate and therefore belongs to the liquidating trust.

THE COURT: Do you have any problem with that?

MR. GOULD: No.

THE COURT: All right. I would order you, then, Mr. Gould, to turn over the proceeds in the amount that is presently available, namely $67,500, plus whatever interest accrues, forthwith. I believe you said it was –

MR. GOULD: It's now $68,000. We paid a thousand dollars in expenses, so I've got $1,500 in interest income.

THE COURT: I don't think Mr. Stettin would have any problem with the expense incurred to go in and look at them and hall [sic] them off.

MR. STETTIN: No, sir.

THE COURT: $68,000, if that's an even amount, forthwith.

The Court will determine forthwith to be by Monday at 5 o'clock. Thereafter I would impose, I find you in contempt of court, if it's not done, and impose a sanction of $1,000 a day until such property has been given over to the estate.

MR. STETTIN: Judge, can we have a determination, since Mr. Gould has already indicated he will not abide by this Court's order, that if he does not within a reasonable time after July 31st, 1989 at 5:00 p.m., even in light of the punishment of a thousand dollars a day, that you either certify the respondent up to the district judge for a finding of contempt, which would include incarceration, or that you in fact order incarceration if he fails to abide, if you believe you have the jurisdiction to do it.

THE COURT: I think I have the jurisdiction but to avoid any pitfalls we will refer it up to the District Court.

MR. STETTIN: Yes, sir. I want him to pay the money, I don't want him in jail. Please understand that, Judge. Certainly I need him Tuesday afternoon. Give him until Friday of next week, at the thousand dollars a day, if he does not, then certify it up?

THE COURT: That will be fine.

MR. STETTIN: Thank you, sir.

THE COURT: I think that the feeling of the Court is today being Thursday, certainly we ought to give Mr. Gould enough time to make arrangements to withdraw the money wherever or to do whatever he has to do to procure the funds to comply with the Court's order. Thereafter, a thousand dollars a day and thereafter, after five days, certification to the District Court.

I was interested, Mr. Gould, if I listened carefully, and I did listen carefully to your comments in your deposition about the Court contacting the District Judge and getting him to declare the matter moot.

Was I on the wrong track?

MR. STETTIN: No, what he said was, I think Mr. Gould was saying that he is concerned that if he pays the money over, he moots any appeal that he might have from that order, once he's complied with it.

THE COURT: Read me the colloquy again, please.

MR. STETTIN: I will and here it is. It's on Pages 10 and 11. The question was;

"Q. If ordered by the Court to turn it over, will you turn it over?

"A. No. If ordered by the Court to turn it over or a sanction is imposed upon me for not turning it over, I will not turn it over because my good friends here" –

Meaning Salter and Ziegler.

– "and perhaps you, too" –

Meaning me.

– "or maybe even the Court would then moot or demand that the Court to which we appeal, to which I appeal Judge Weaver's decision moot the appeal and the court above would have to do that on the grounds that it lacked jurisdiction since there would be no dispute, no controversy."

Putting it in his mind, I think Mr. Gould is analogizing this very much to what the Eleventh Circuit did on the order of confirmation, substantial consummation would render any relief that they would give moot.

THE COURT: All right. I didn't want the deposition or the record to reflect that I have any part in the appellate proceedings.

All right. Fine. Thank you all.

MR. STETTIN: Thank you, Judge.

(Whereupon, the hearing was concluded.)

CERTIFICATE

STATE OF FLORIDA)
: SS
COUNTY OF DADE)

I, JACLYN M. OUELLETTE, Shorthand Reporter and Notary Public in and for the State of Florida at Large do hereby certify that I was authorized to and did report in shorthand the proceedings at the foregoing hearing, and that the pages, numbered from 1 through 72, inclusive, contain a full, true and complete transcription of my shorthand report of same.

WITNESS my hand this 11th day of September, 1989.

Jaclyn M. Ouellette

My Commission Expires:
February 14, 1990.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

IN RE: HOLYWELL CORPORATION, et al., Debtors,	CASE NO. 89-2629-CIV-MARCUS
THEODORE B. GOULD, Appellant, vs. FRED STANTON SMITH, Trustee of the Miami Center Liquidating Trust, Appellee.	

Miami, Florida
October 29, 1990
9:28 a.m.

APPEARANCES:

HERBERT STETTIN, ESQ.
AmeriFirst Building – Suite 2215
One S.E. 3rd Avenue
Miami, Florida 33131
Appearing on behalf of the Appellee

BARRY R. DAVIDSON, ESQ.
3200 Miami Center
201 South Biscayne Boulevard
Miami, Florida 33131-2312

Appearing on behalf of the Bank of New York

THEODORE B. GOULD
2568-D Ivy Road
Charlottesville, Virginia 22901
Appearing pro se

REPORTER: ROBERT A. RYCKOFF
301 North Miami Avenue – Fifth Floor
Miami, Florida 33128

[p. 2] (Call to order of the Court.)

THE COURT: Let me call in Re: Holywell Corporation, 89-2629.

Good morning, folks, and how are you?

This is In Re: Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates, and Theodore B. Gould, debtors.

And I wanted to bring everyone in to see where we stood and what kind of timing made sense for the purposes of scheduling this cause.

As I understand it, the issue is the liquidating trustee is requesting a hearing on the Bankruptcy Court's order of August 14th where there was a certification of contempt against Mr. Gould.

So let me begin. If you folks would be kind enough to state your appearances.

MR. STETTIN: I am Herbert Stettin and I am representing Fred Stanton Smith, who is the trustee of the Miami Center Liquidating Trust.

THE COURT: Good morning to you, sir.

MR. STETTIN: Good morning.

THE COURT: And other counsel.

MR. DAVIDSON: I am Barry Davidson, Judge. I represent Bank of New York.

MR. GOULD: I am Theodore B. Gould and I represent [p. 3] myself.

THE COURT: All right. Where do we stand on the case, folks?

MR. STETTIN: Your Honor, the Bankruptcy Court entered an order finding Mr. Gould in contempt, as you pointed out, dated August 1, 1989.

Thereafter there was an order certifying Mr. Gould to be in contempt, dated August 14th.

And the reason for the two is because the August 1 order gave him a time within which he could purge himself of the contempt. He declined to do so. The Court found that he had failed to do so and said that he should be certified up to this court to be held in contempt as recommended.

The contempt is a fairly basic one and I do not believe that there is a dispute as to the underlying facts.

Mr. Gould, I am sure, is going to be arguing the law that he considers applicable. We respectfully disagree. We are not going to be, in my opinion, relitigating the underlying factual basis.

THE COURT: So how would you have me proceed, Mr. Stettin?

MR. STETTIN: I think that the order is self-explanatory. There is no dispute as to the facts. Mr. Gould, it seems to me, has the burden of showing why he [p. 4] should not be held in contempt by this Court.

THE COURT: Mr. Gould.

MR. GOULD: I have filed objections under Rule 9033 to the order certifying contempt. I don't think that it's necessary to do anything more than have the Court – have Mr. Stettin respond to my objections and give me the opportunity to file a reply brief at that point. As far as I am concerned the Court –

THE COURT: To be disposed of on the papers?

MR. GOULD: Yes.

THE COURT: Do we need argument on it?

MR. GOULD: No. This is a symbolic gesture. I want to take this up to the Eleventh Circuit.

THE COURT: Have you considered the wisdom of retaining a lawyer to represent you?

MR. GOULD: It isn't necessary, Your Honor.

THE COURT: It may not be, but I will ask you whether you –

MR. GOULD: I don't –

THE COURT: Have you considered the wisdom of retaining –

MR. GOULD: I have the issues here.

THE COURT: I raise the issue because I always do when a party proceeds pro se, especially when the issues concern contempt.

[p. 5] MR. STETTIN: You would not be familiar with much of the history of this case, Judge, because you have been fortunate that – as my memory tells me – this is the only one of these that you have ever had on the merits. Every one of the other district courts – district court judges in this district, almost without exception, and some two, three and four times, have had the good fortune to have to deal with parts of this case. This is approximately the 82nd or 83rd separate appellate proceeding to emanate from this case.

The Eleventh Circuit has recently ruled in several of these appeals, and I think what Mr. Gould means when he says that this is symbolic is that those rulings have been adverse, particularly what we call the income tax rulings, and I have got a copy of that opinion, which I was going to leave you anyway. It came out in the last 30 days or so.

THE COURT: In any event, you have considered the wisdom of retaining an attorney and do not wish to do so?

MR. GOULD: Yes, I have. I do not wish to.

THE COURT: All right. Mr. Stettin, he says he has filed his designation of objections and is seeking a response from you.

MR. STETTIN: He has filed objections to the order of contempt and I have no objection to responding in writing.

[p. 6] I will tell the Court that I think you can handle the matter orally as well as you can in writing, Judge. It has been done so many times before.

THE COURT: There is nothing new or different.

How long will it take you – and I will give you whatever time you need – I don't want to put you to any extra work but –

MR. STETTIN: Written response or oral response?

THE COURT: Just a written –

MR. STETTIN: Just a –

THE COURT: Because he said he would want to reply to that anyway, and so just so the record is complete, you can tell me what time frame makes sense for you.

MR. STETTIN: Ten days is fine.

THE COURT: All right. We will give you ten days to file a response to – actually all he has really done is designate the record, but I take it we should –

MR. STETTIN: I do have a document called objections to order of contempt.

MR. GOULD: I filed objections to it.

THE COURT: Then I haven't seen that. When did you file that?

MR. STETTIN: I will tell you the date it was filed. That may help you. It is dated August 10, 1889.

It's possible, Judge, that the clerk of the [p. 7] Bankruptcy Court did not include that.

THE COURT: We have the objections to the order of contempt filed by – that's what you are referring to?

MR. STETTIN: Yes, sir.

THE COURT: And that was submitted pro se by Mr. Gould.

MR. STETTIN: And we did file a response to objections to order of contempt and that was done on about August 21, 1989.

THE COURT: Is there anything further – maybe I am missing something, Mr. Gould. What else is there?

MR. STETTIN: There is not.

The only thing that has come up is a copy of the Eleventh Circuit's opinion on the tax question, which was still open at the time these pleadings were filed. With the Court's permission, I will give it to your clerk.

THE COURT: Sure.

Mr. Gould, let me just sharpen the question then – has he responded or –

MR. GOULD: I am not aware of any response to the objections because I haven't received it.

MR. STETTIN: (Handing to Mr. Gould.)

MR. GOULD: Oh, yes, he has. I am sorry.

THE COURT: Did you want an opportunity to file a response –

[p. 8] MR. GOULD: I guess I would like an opportunity to reply to this, particularly in view of the Eleventh Circuit's –

THE COURT: How much time do you want?

MR. GOULD: Ten days is fine.

THE COURT: All right. We will give you ten days from today to file a reply to his response.

I take it that will do it and we can resolve it on paper and there is nothing further we need do, from everyone's perspective?

MR. STETTIN: Yes.

MR. GOULD: That's correct.

THE COURT: Mr. Davidson.

MR. DAVIDSON: Yes, sir. I would agree. I follow Mr. Stettin's lead.

I am not sure that brief oral argument wouldn't be helpful to –

MR. STETTIN: There is no such thing as brief oral argument in this case, but if you – and I do think oral argument would be useful, but it –

THE COURT: I leave it to counsel. If you want me to set if [sic] for oral argument, I will set it. If you want to rely on the papers, I am happy to proceed by the papers. So it's your call, counsel. If any one of you say I want oral argument, you got it. If not, I will just do it on paper.

[p. 9] MR. STETTIN: We would like it.

MR. GOULD: Let's have it because I want the record of the case.

THE COURT: All right. Pat, can you give me some time. We are going to give him ten days to file a reply. Can you give me a date sometime in the next 30 days or so for argument.

MR. GOULD: Your Honor, it would have to be in December.

THE COURT: Why is that?

MR. GOULD: Because there are three hearings before the Eleventh Circuit the week of November 26th.

THE COURT: You want me to set it in December, Mr. Stettin?

MR. STETTIN: That's fine with me, Judge.

I was aware of two. I wasn't aware of three.

MR. GOULD: Three.

MR. STETTIN: It's hard to keep up, Judge.

THE COURT: Pat, do we have a Friday that we are setting these down for in December?

The 14th?

THE CLERK: Yes, on the 14th. It would be at 1:00 o'clock.

THE COURT: 1:00 o'clock, December 14th.

any problem with that time?

[p. 10] MR. GOULD: No.

THE COURT: Mr. Stettin, that's okay for you?

MR. STETTIN: Not that I am aware of.

THE COURT: Mr. Gould, that's okay for you?

MR. GOULD: That's fine.

THE COURT: Mr. Davidson.

MR. DAVIDSON: Yes, sir.

THE COURT: All right, we will see you folks back here at that time, and we will take your reply – we will ask you, Mr. Stettin, if you would be kind enough to prepare just a simple order indicating the cause had come on in for a conference today. Pursuant to our discussion, we have given Mr. Gould ten additional days to file a reply to your response, and we had set the matter down for the 14th of December at 1:00 o'clock for argument on the contempt motion.

And if you would show that to Mr. Gould or read it to him and to Mr. Davidson before you submit it to us, we would be much appreciative.

MR. DAVIDSON: Your Honor, I apologize –

THE COURT: Sure.

MR. DAVIDSON: – but I did want the record to be clear. This is argument on the contempt recommendation from Judge Weaver.

THE COURT: Correct.

[p. 11] I take it that's the only issue I have in front of me.

MR. GOULD: Yes.

THE COURT: Thank you all much for your time and efforts. We will see you back here on the 14th.

And thank you, Mr. Stettin, for being kind enough to prepare that for us.

(Proceedings concluded at 9:35 a.m.)

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE: HOLYWELL CORPORATION, et al., Debtors	:	
THEODORE B. GOULD, Appellant,	:	CASE NO. 89-2629-Civ-Marcus
v.	:	
FRED STANTON SMITH, Trustee of the Miami Center Liquidating Trust, Appellee	:	

MOTION FOR REHEARING

In accordance with Bankruptcy Rules, Rule 8015, Theodore B. Gould, appearing *pro se,* files a motion for rehearing of this Court's order, entered on May 17, 1991, (see attached as Exhibit A) upon the following grounds:

1. It is not possible for Theodore B. Gould to comply with the order of this Court requiring turnover to Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust, of the proceeds received from the sale of the concrete pumps, since all of these funds have been used for the payment of attorneys' fees to Arnold & Porter, the debtors' counsel, in the proceedings for filing a petition for writ of certiorari concerning the Eleventh Circuit's divided opinion, cited as *In re Holywell Corp.*, 911 F.2d 1539 (11th Cir. 1990).

It is interesting to note that the Solicitor General of the United States has also filed a petition for writ of certiorari concerning the same issue.[1] The Solicitor General has concluded, in relevant part, as follows, as the principal reason for granting the petition:

> "The decision in this case threatens to create a tax loophole of troubling proportions. *It would allow a liquidating trustee to be appointed in a case under Title 11, take title to the debtor's assets, invest or dispose of those assets in a manner that realizes taxable income, but neither report nor pay the taxes owed on that income.* In reaching this result, the court of appeals ignored the plain language and evident purpose of the statutory provisions that have been enacted by Congress specifically to ensure that such a loophole would not exist." (Emphasis added) *Exhibit B, p. 8.*

This Court's order approving the bankruptcy court's "Order Of Certification Of Contempt," illustrates of the abuses of judicial power arising from the failure to administer the plain language of the bankruptcy statutes and applicable tax laws enacted by Congress:

First. If, as this Court has concluded, "*all* of the debtor's assets (original emphasis) as defined by section 541(a) of the Bankruptcy Code [footnote omitted], are assets of the Miami Center Liquidating Trust," *Order, p. 5,* and the Eleventh Circuit has held that "the government

---

[1] "Whether the trustee of the liquidating trust, appointed by the bankruptcy court to receive and dispose of the debtors' assets pursuant to a Chapter 11 plan of reorganization is required to file federal income tax returns on behalf of the debtors and pay the taxes due." *See attached Exhibit B, p. (i).*

[is not] without the ability to collect taxes on the postconfirmation sale of the property[.] . . . [because] *the reorganized debtor, not the liquidating trustee is responsible for such taxes,*" (Emphasis added) *911 F.2d at 1545,* the question must be raised: what is the source of funds for the payment of the taxes? See *Holywell, supra* (Cox dissenting)[2]

Second. If, notwithstanding the plain language of 26 U.S.C. Section 6012(b)(4), the trustee is *not* a fiduciary acting on behalf of the individual debtor's estate and responsible for the payment of the taxes as an *assignee* of the debtor Theodore B. Goulds' property, the historical precedent of the United States Supreme Court precludes the transfer of such property.[3] Furthermore, Mr. Stettin,

---

[2] "Although the court encourages us to take consolation in the fact that the government may seek collection of the tax monies from the reorganized debtor, *it remains unclear from where that money will come.*" (Emphasis added) 911 F.2d at 1547.

[3] *See Bramwell v. United States Fidelity & Guaranty Co.,* 269 U.S. 483, 488 (1926), citing *Beaston v. The Bank of Delaware,* 12 Pet. 102, 136 (1838) " . . . *'whenever he [a debtor] is thus divested of his property, the person who becomes invested with the title, is thereby made a trustee of the United States and is bound to pay their debt first out of the proceeds of the debtor's property'.*" (Emphasis added) See also *King v. United States,* 85 S.Ct. 427, 432 (1964) "We agree with Judge Browning, writing in *United States v. Crocker,* 313 F.2d 946, 949, that *'the debts paid by a liquidating receiver [and, we add, distributing agent], like those paid by an executor, administrator, or assignee for the benefit of creditors, are primary obligations of the debtor;* the phrase 'for whom, or for which he acts' should be read as a general acknowledgment of this fact rather than as imposing a restriction upon the reach of Section 192 inconsistent with the overall purpose of this section and Section 191.' *We reject, therefore, the proposition that because distributing agents in*

the attorney for the "liquidating trustee," has, in his Brief In Opposition to the petitions for writ of certiorari filed in the Supreme Court by the debtors and the Solicitor General, distinguished the functions and powers of his client from a "trustee in a case under title 11" based upon the assertion that the individual appointed Trustee of the Miami Center Liquidating Trust lacked "the strong arm authority given trustees under section 544 of the Bankruptcy Code, nor does he have the power to void preferential and fraudulent transfers under Bankruptcy Code sections 547 and 548." *Brief In Opposition, p. 28.* If the Trustee of the Miami Center Liquidating Trust lacks the "strong-arm authority" of a trustee in a case under title 11, he has *no* authority to void any postconfirmation transfer of property of the individual debtor's estate and his consent was not required for the sale of the concrete pumps.

Also, since this Court has held, "all of the debtors' assets . . . are assets of the Miami Center Liquidating Trust," the individual appointed trustee of the Miami Center Liquidating Trust by the bankruptcy court is an "assignee" and a "fiduciary" of Theodore B. Gould's individual estate, and thus responsible under the plain language of 26 U.S.C. Section 6012(b) for filing returns and the payment of income taxes under Section 6151(a). *Otherwise,* title to the concrete pumps has *not* been assigned to the trustee as a Section 541(a) asset of the debtor Theodore B. Gould's estate and the trustee is not entitled

---

Chapter XI proceedings act primarily for the court rather than for the debtor they are categorically excluded from the coverage of Section 192." (Emphasis added)

to receive the postconfirmation income from the sale of the concrete pumps as a receiver would. See *Spring Valley Water Co. v. San Francisco,* 246 U.S. 391, 395 (1918).[4]

26 U.S.C. Section 7701(a) (6) defines a "fiduciary" as " . . . a guardian, trustee, administrator, recever [sic], conservator, or any other person acting in a fiduciary capacity for any person," and the applicable Treasury Regulation provides, in relevant part, that a fiduciary " . . . holds in trust an estate to which another has the beneficial title or in which another has a beneficial interest or *receives and controls income of another as in the case of a receiver.*"

2. The second question is: what lawful authority the bankruptcy court had to appoint Fred Stanton Smith as Trustee of the Miami Center Liquidating Trust under the provisions of the Bank's plan, filed on the debtors' behalf, and grant the powers of a receiver to the "liquidating trustee"?

First. 11 U.S.C. Section 105 sets forth the scope of authority granted to a bankruptcy judge within the parameters defined in 28 U.S.C. Section 157, and Secton [sic] 105(b) specifically limits the power of a bankruptcy court, stating that notwithstanding the court's authority to " . . . issue any order, process, or judgment that is necessary or appropriateto [sic] carry out the provisions of this title," a bankruptcy court may not appoint a receiver in a case under this title.

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[4] The term "receiver" has been defined by the Supreme Court as "embracing any person acting as an agent or depository of funds for the court."

Rule 201 of the Rules of Bankruptcy Procedure, as amended, defined the powers and authority of a "receiver" under the Bankruptcy Act of 1989, in relevant part, as follows:

> "Subject to the provisions of this rule, the court may appoint a receiver when necessary in the best interest of the estate (1) to take charge of the property of a bankrupt; (2) to conduct the business of the bankrupt; or (3) to afford representation to the estate in an action, adversary proceeding, or contested matter where no trustee has qualified. . . . [a]nd the authorization to conduct the business of the bankrupt after adjudication shall continue only for such time as may be in the best interest of the estate and consistent with orderly liquidation."

Fred Stanton Smith was granted the powers of a receiver, as the Solicitor General has stated in his petition for writ of certiorari, *see Exhibit A. p. 16,* and was appointed in accordance with 11 U.S.C. Section 1123(a)(7), which allows the contents of a plan to provide for the appointment of a trustee under the plan "consistent with the interests of creditors and equity security holders and with public policy."

Second. The principle of law embodied in the term "public policy" is that no person can lawfully do that which has a tendency to be injurious to the interests of

the State. Furthermore, the courts will not enforce contracts which are unlawful or have a mischievous tendency. See *Bank of the United States v. Owens*, 27 U.S. 527 (1829.)[5]

Third. This Court has clearly erred in citing *Holywell [sic] v. Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986). The Eleventh Circuit's opinion, in *Miami Center Limited Partnership v. The Bank of New York*, 838 F.2d 1547, 1558 (11th Cir.), *cert. denied* 488 U.S. 823 (1988), *vacated* the district court's order affirming the bankruptcy court's order confirming the Bank's plan. Thus, the Eleventh Circuit adopted the standard established by the Supreme Court in *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950) and "clear[ed] the path for future relitigations of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance"; *accord Deakins v. Monaghan*, 484 U.S. 193, 200 (1988).

Insofar as the appointment of the "liquidating trustee" is concerned, the issue before this Court is of a *jurisdictional* nature and concerns the bankruptcy court's lack of statutory authority to appoint a "receiver." It is *not* frivolous or moot. It can be raised at any time, since a court in a bankruptcy proceeding or case cannot assert authority which it has not been granted or which has been denied. In fact, it is a constitutional principle that the courts of the United States have limited authority

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[5] "Courts are instituted to carry into effect the laws of a country, how can they become auxilliary [sic] to the consummation of violations of law?" *27 U.S. at 538.*

and, in accordance with Article III, Section 2, the jurisdiction of such courts is defined by act of Congress. *Cary v. Curtis,* 3 How. 236, 245 (1845)

3. This Court's reliance upon a provision of the Bank's plan to grant postconfirmation authority to the bankruptcy court to retain jurisdiction over the debtors "in order to enter any order necessary or appropriate to enforce the plan" is clearly *reversible error.*[6]

28 U.S.C. Section 157 defines the jurisdiction of a bankruptcy judge. A bankruptcy court has authority to exercise *in rem* jurisdiction over the debtor's property *prior* to the confirmation of a plan and core proceedings include "matters concerning the administration of the estate," *Section 157(b)(2)(A).* However, as the Eleventh Circuit has held, the administration of the estate ended as an effect of confirmation. *Holywell,* 911 F.2d at 1545 ("[A]dministration of the estate ceases upon confirmation of a plan of reorganization.")

Furthermore, there is a serious question about whether the Bank's plan *is* the "law of the case," *Order, p. 4,* and is binding pursuant to 11 U.S.C. Section 1142, since the Bank's plan did not satisfy the Fair and Equitable Standard. See *In re Holywell Corp.,* 913 F.2d 873, 879 (11th Cir. 1990).[7] The Eleventh Circuit affirmed the *reversal* of

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[6] The bankruptcy court's statutory authority is limited to exercising control of the actions of the "liquidating trustee" in implementation of the Bank's plan.

[7] "At issue in this appeal is whether the Bank's plan complies with the applicable provisions of title 11, namely section 1122. See 11 U.S.C. Section 1129(a)(1) (requiring that the plan

the bankruptcy court's order confirming the Bank's plan, entered on August 8, 1985, 54 B.R. 41 (Bkrtcy. S.D. Fla. 1985), on the grounds that the Bank's plan violated the Miami Center Joint Venture's contractual priority superior to the Bank's liens and the interests of unsecured creditors.

More important, the historical precedent of the Supreme Court has held that if a plan does not provide for the payment of income taxes and the statutory priority of the United States, a court lacks authority to confirm such a plan because it fails to satisfy the Fair and Equitable Standard. See *United States v. Key,* 90 S.Ct. 1049 (1970).[8]

---

comply with provisions of title 11). Also at issue is whether the Bank's plan discriminates unfairly with respect to the Miami Center Joint Venture, a creditor who is impaired under and who has not accepted the plan. See 11 U.S.C. Section 1129(b)(1) (requiring that the plan not discriminate unfairly with respect to the classes of impaired claims. . . . If the plan unfairly creates too many or too few classes, or the classifications are designed to manipulate class voting or *if the classification scheme violates basic priority rights, the plan cannot be confirmed.*" (Emphasis added)

[8] "This court has long held that these words, along with the words 'fair and equitable' . . . in no way authorize a district court to errode [sic] priorities otherwise granted by law, and it follows that this language cannot be taken to exclude by implication an explicit statutory priority, such as that granted the United States. . . . In short, the words 'fair and equitable' in Chapter X are terms of art, and no plan can be 'fair and equitable' which compromises the rights of senior creditors in order to protect junior creditors." *90 S.Ct. at 1052.*

The Fair and Equitable Standard includes the Absolute Priority Doctrine under which creditors may participate in the distribution of the proceeds of the sale of the property of a debtor's estate only in accordance with their respective priorities. *Protective Committee v. Anderson*, 390 U.S. 414, 441 (1968)[9]

It is clear that the Bank's plan was a scheme to avoid the payment of income taxes and grant the Bank, as the plan's proponent, postpetition interest on its "undersecured" claim. The Bank of New York has conceded that the purpose of creating the Miami Center Liquidating Trust and the appointment of the Trustee was to *avoid* the payment of income taxes and *defeat* the statutory priority of the United States. However, it is clear that the United States, claim for the payment of income taxes has a statutory priority under 11 U.S.C. Section 503(b)(1)(B) and 507(a)(1), or it has been granted an absolute priority under 31 U.S.C. Section 3713(a). There are *no* other alternatives. A court of the United States should not enforce an unlawful contract as a binding agreement and use its contempt power to require an individual to turn over funds to a bankruptcy court's agent appointed for the

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[9] The Brief In Opposition of Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust, to the petitions for writ of certiorari filed by the debtors and the Solicitor General, is based upon the remarkable argument that the tax claim of the United States "does not have priority" on the grounds that the definition in the Bank's plan of an "administrative claim" did not include taxes and the postconfirmation sale of realty is not an administrative expense of the bankruptcy estate entitled to priority under 11 U.S.C. Section 503. *Brief In Opposition, p. 20.*

purpose of engaging in conduct injurious to the interests of the United States.

For the foregoing reasons, Appellant Theodore B. Gould respectfully requests that this Court vacate its order entered on May 17, 1991. A separate motion for a stay pending appeal will be filed if this motion for rehearing is not granted.

Respectfully submitted,

/s/ Theodore B. Gould
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion For Rehearing was sent by regular United States mail on May 24, 1991, to:

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Theodore B. Gould, *pro se*

APPENDIX E

STATUTES CITED

RULES OF THE SUPREME COURT

Rule 10

CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

* * *

RULES OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

11th Cir. R. 36-1 Affirmance Without Opinion When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment directed verdict or judgment on the pleadings is supported by the record;

(e) judgment has been entered without an error of law;

and an opinion would have no precedential value , the judgment or order may be affirmed or enforced without opinion.

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11 U.S.C. § 541

§ 541. Property of the estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is –

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date –

(A) by bequest, device, or inheritance;

(B) as a result of a property settlement agreement with debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

* * *

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11 U.S.C. § 1142

§ 1142. Implementation of plan.

(a) Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.

(b) The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

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26 U.S.C. § 6012 (b)

§ 6012. Persons required to make returns of income

* * *

(b) Returns made by fiduciaries and receivers. –

(1) Returns of decedents. – If an individual is deceased, the return of such individual required under subsection (a) shall be made by his executor, administrator, or other person charged with the property of such decedent.

(2) Persons under a disability. – If an individual is unable to make a return required under subsection (a), the return of such individual shall be made by a duly authorized agent, his committee, guardian, fiduciary or other person charged with the care of the person or property of such individual. The preceding sentence shall not apply in the case of a receiver appointed by authority of law in possession of only a part of the property of an individual.

(3) Receivers, trustees and assignees for corporations. – In a case where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

(4) Returns of estates and trusts. – Returns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof.

* * *

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28 U.S.C. § 1254

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

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(3)

Supreme Court, U.S.
FILED
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No. 92-934

In The

Supreme Court of the United States

October Term, 1992

THEODORE B. GOULD,

Petitioner,

v.

FRED STANTON SMITH, as TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, and THE BANK OF NEW YORK,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT, THE BANK OF NEW YORK

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ISSUES PRESENTED

I. Did the Bankruptcy Court and District Court properly find the Petitioner in contempt?

II. Did the Bankruptcy Court and District Court properly impose sanctions?

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No. 92-934

In The

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October Term, 1992

THEODORE B. GOULD,

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT, THE BANK OF NEW YORK

INTRODUCTION

The Petitioner is no stranger to this Court. The current petition is his tenth for writ of certiorari filed from appeals in five bankruptcy cases.[1] The Petitioner has also

[1] Case Nos. 90-1551, 90-1361, 90-761, 90-676, 89-917, 89-864, 89-708, 88-80, and 87-1988. References to the Petitioner's Appendix will be denoted as "___a."

previously filed a petition for writ of mandamus.[2] On only one occasion, *Holywell Corp. v. Smith*, ___ U.S. ___, 112 S.Ct. 1021 (1992), has this Court found one of the petitions worthy of review.[3]

Moreover, Petitioner again comes to this Court after presenting the same arguments over the past eight years to:

Two different bankruptcy judges;

Ten different district court judges in over 30 separate appeals; and

Nine judges of the United States Circuit Courts of Appeals in over twenty separate appeals and in petitions for writ of prohibition and mandamus. None of those appeals have been successful.

JURISDICTION

The Petitioner seeks review of the Bankruptcy Court's order of August 14, 1989, and the District Court's order of May 17, 1991, finding him in contempt and imposing sanctions for his refusal to turn over cash proceeds of approximately $67,500 to a court-appointed trustee. Because Petitioner has failed to demonstrate either the existence of a conflict among the United States

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[2] Case No. 87-1989.

[3] In that case, it is submitted that the petition of the Solicitor General, and not that of the debtors, persuaded this Court to review a federal income tax issue relating to the bankruptcies.

Circuit Courts of Appeals or the existence of an important question of federal law which has not been, but should be settled by this Court, *see* Sup. Ct. R. 10.1(a)-(c),[4] no jurisdictional basis has been established for granting the petition for writ of certiorari.

STATEMENT OF THE CASE

Petitioner Theodore B. Gould ("Gould"), along with four entities he either owned, controlled or dominated,[5] the Miami Center Limited Partnership ("MCLP"), Holywell Corporation ("Holywell"), Miami Center Corporation ("MCC"), and Chopin Associates ("Chopin"), were involved in developing the Miami Center Project ("Miami Center"), a thirty-five story office building and hotel complex situated at a bay-front site in downtown Miami, Florida. The Bank of New York ("Bank")[6] was the

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[4] *See Braxton v. United States*, ___ U.S. ___, ___; 111 S.Ct. 1854, 1857 (1991) (a principal purpose of this Court's certiorari jurisdiction is to resolve conflicts among the Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law).

[5] Petitioner owned 100% of Holywell's stock and also served as its president and director. Holywell, in turn, owned 100% of the stock of MCC, and Petitioner served as president and director of MCC. Petitioner and MCC were the sole general partners of Chopin and MCLP.

[6] Pursuant to Supreme Court Rule 29.1, the following is a listing of the relationships of The Bank of New York:

(a) Parent of the Bank – The Bank of New York Company, Inc.

(b) "Affiliates" of the Bank are:
BNY Holdings (Delaware) Corporation

lead construction lender for the Miami Center who, beginning in March of 1980, advanced over $196,000,000 under the terms of a series of notes, mortgages and other loan documents.

Petitioner and the entities were in default of their loan obligations as of February 1, 1984, and the Bank instituted a state court foreclosure action in July 1984. Shortly thereafter, on August 22, 1984, the Petitioner and the affiliated debtors[7] each filed voluntary Chapter 11 petitions in bankruptcy. The cases were initially consolidated for joint administrative purposes, and the debtor

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The Bank of New York (Delaware)
The Bank of New York Overseas Finance, N.C.
Affinity Group Marketing, Inc.
ARCS Mortgage Corporation (Florida)
ARCS Mortgage, Inc. (California)
BNY Leasing, Inc.
Eastern Trust Company
The Bank of New York Life Insurance Company, Inc.
Capital Trust Company
BNY Financial Corporation
BNY Personal Brokerage, Inc.
Beacon Capital Management
The Bank of New York Trust Company, Inc.
The Bank of New York Trust Company of California
The Bank of New York Trust Company of Florida, N.A.
Leonard Newman Agency, L.P.

[7] For the purposes of this Brief in Opposition, Petitioner and the four entities are hereinafter collectively referred to as "Petitioner and the affiliated debtors." Gould will be referred to individually as "Petitioner."

estates were later substantively consolidated by the Bankruptcy Court on July 23, 1985.[8]

Petitioner and the affiliated debtors, along with the Bank, each filed competing reorganization plans. On August 8, 1985, the Bankruptcy Court confirmed the plan proposed by the Bank ("Plan"), which called for the formation of the Miami Center Liquidating Trust ("Liquidating Trust"). *In re Holywell Corp.*, 54 Bankr. 41 (Bankr. S.D. Fla. 1985). The Liquidating Trust included all assets contained in Petitioner's and the affiliated debtors' bankruptcy estates. The Plan also required the Bankruptcy Court to appoint a trustee to liquidate and distribute all property in the Liquidating Trust to pay the claims of creditors. Any residual cash or property was to be returned to Petitioner and the affiliated debtors.[9] On October 10, 1985, the trustee began implementing the Plan in accordance with its terms.

Displeased with the Bankruptcy Court's ruling, Petitioner and the affiliated debtors appealed the decision to the District Court, which affirmed the confirmation order, *Holywell Corp. v. Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986), and the Court of Appeals for the Eleventh Circuit, which dismissed the appeal as moot because "the plan had been substantially consummated and . . . it had

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[8] Under the bankruptcy and equitable doctrine of "substantive consolidation," the assets and liabilities of related debtors are pooled, and inter-debtor obligations are eliminated.

[9] The Plan also provided the Bankruptcy Court would retain jurisdiction after confirmation and until entry of a final decree in order "to make any orders which may be necessary or appropriate to carry out the provisions of this Plan."

become legally and practically impossible to . . . restore the status quo before confirmation."[10] *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547, 1557 (11th Cir. 1988). This Court denied Petitioner's and the affiliated debtors' petition for writ of certiorari. *Miami Center Ltd. Partnership v. Bank of New York*, 488 U.S. 823 (1988).

Having failed by direct appeal, Petitioner and the affiliated debtors commenced a series of collateral challenges designed to frustrate the confirmed and substantially consummated reorganization Plan. In August 1987, Petitioner and Holywell instituted a lawsuit in the Western District of Virginia in the name of Holywell's wholly-owned, non-debtor subsidiary, Twin Development Corporation ("Twin"). The action challenged the trustee's right to place Twin's stock in the Liquidating Trust. Both the Bankruptcy Court and the District Court for the Southern District of Florida ordered Petitioner and Holywell to cause the suit to be dismissed. Rather than comply with the Courts' rulings, however, they filed four more actions, in the name of four other wholly-owned Holywell subsidiaries, in the Western District of Virginia, challenging the trustee's right to proceeds from the sale of land owned by Twin. The Florida District Court held Petitioner and Holywell in contempt and imposed monetary sanctions equivalent to the Bank and the trustee's costs and reasonable attorneys' fees incurred in

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[10] Petitioner and the affiliated debtors had failed to obtain a stay pending review of the confirmation order.

defending the Virginia actions.[11] Petitioner and Holywell appealed the contempt order to the Court of Appeals for the Eleventh Circuit, which recently affirmed the District Court. *In re Holywell Corp.*, 967 F.2d 568 (11th Cir. 1992).[12]

A second collateral challenge occurred in October 1987, when Petitioner and the affiliated debtors commenced an action in Florida state court against the Bank and trustee. The complaint alleged negligence, conversion, breach of contract and breach of fiduciary duty in connection with the bankruptcy proceedings, and claimed, *inter alia*, that the trustee had improperly failed to pay certain creditor claims, failed to establish a reserve for the payment of income taxes,[13] and illegally granted credits against the Liquidating Trust.

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[11] The District Court in Virginia entered summary judgment in favor of the Bank and trustee and against Twin. The Fourth Circuit Court of Appeals dismissed Twin's appeal.

[12] Undoubtedly, Petitioner will seek a writ of certiorari for the eleventh time in connection with this case.

[13] Because the reorganization plan failed to contain an express provision as to the payment of taxes, the trustee, in December 1987, filed an adversary proceeding in the Bankruptcy Court which named the United States of America ("United States"), the Bank, the Petitioner, and the affiliated debtors. The action sought declaratory judgment concerning the obligation to file tax returns and pay taxes with respect to property in the Liquidating Trust. The Bankruptcy Court held the trustee did not have an obligation to pay taxes or file returns. *In re Holywell Corp.*, 85 Bankr. 898 (Bankr. S.D. Fla. 1988). The District Court in an unreported decision, and the Court of Appeals, both affirmed. *In re Holywell Corp.*, 911 F.2d 1539 (11th Cir. 1990). This Court reversed, holding that the trustee was required to file returns and pay taxes since Petitioner and the affiliated debtors would have had to do so had the Plan not assigned their property to the Liquidating Trust. *Holywell Corp. v. Smith*, ___ U.S. ___; 112 S. Ct. 1021 (1992).

The Bank and the trustee removed the case to the Bankruptcy Court pursuant to 28 U.S.C. § 1452 and Bankruptcy Rule 9027 and each filed a motion to dismiss. The Bankruptcy Court granted both motions and dismissed the action because: (1) the complaint failed to sufficiently allege that the trustee was guilty of gross negligence, willful default, or misconduct; and (2) all matters set forth in the complaint had either been determined by the Bankruptcy Court in other adversary proceedings or was in the process of being determined or being reviewed on appeal. The dismissal was appealed to the District Court, which affirmed, *In re Holywell Corp.*, 93 Bankr. 780 (S.D. Fla. 1988), and the Court of Appeals for the Eleventh Circuit, which affirmed without opinion. *Miami Center v. Bank of New York*, 881 F.2d 1086 (11th Cir. 1989). This Court denied the Petitioner's and the affiliated debtors' petition for writ of certiorari. *Miami Center Ltd. Partnership v. Smith*, 493 U.S. 1057 (1990).

The present petition brings to this Court yet another frivolous collateral challenge seeking to invalidate the reorganization Plan. In 1981 Petitioner purchased concrete pumps and related equipment that became property of the bankruptcy estate upon filing of the Chapter 11 petition and, upon confirmation of the reorganization plan, part of the Liquidating Trust. Despite knowledge that the pumps and equipment were assets of the Liquidating Trust, Petitioner sold the property and refused to turn over the cash proceeds of approximately $67,500 to the trustee.

At a hearing held on July 27, 1989, Petitioner advised the Bankruptcy Court that the proceeds were being held in a brokerage account and that he would not disclose the

name of the brokerage firm or any identifying information. He took the position that he would not turn over the proceeds even if the Bankruptcy Court *ordered him to do* so since the Liquidating Trust had been formed for the improper purpose of avoiding taxes and providing the Bank with a means of unjust financial enrichment. Petitioner stated that because the Liquidating Trust had been created for improper purposes, the Plan was unlawful, voidable and its terms unenforceable.

On August 1, 1989, the Bankruptcy Court entered an order finding the Petitioner in contempt and directing him to turn over the cash proceeds. The order stated that a fine of $1,000 would be imposed for each day that the proceeds were not delivered to the trustee.[14] On August 10, 1989, Petitioner moved for a stay and objected to the Bankruptcy Court's order on the grounds that: (1) the trustee had no interest in the property contained in the Chapter 11 estate, and (2) the Plan itself was invalid. The stay was denied. After notice by the trustee that Petitioner had failed to comply with the order, the Bankruptcy Court, on August 14, 1989, entered an "Order Certifying Theodore B. Gould to be in Contempt."

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[14] The Bankruptcy Court further stated:

> The Court finds and determines the imposition of this fine is a reasonable and necessary means of enforcing this Order given the persistent and deliberate refusal of [Petitioner] to obey the order of this Court and the frustration of the Liquidating Trustee's ability to perform his function as Trustee.

On December 14, 1990, the District Court conducted a *de novo* hearing on the contempt certification and on May 17, 1991, entered an order finding Petitioner in civil contempt.[15] It directed Petitioner to turn over the proceeds to the trustee and imposed a fine of $1,000 for each day that he failed to do so. The District Court also addressed the four grounds asserted by Petitioner in opposition to the contempt certification, rejected them all and accepted the findings of fact and conclusions of law of the Bankruptcy Court. In short, the District Court found that Petitioner had pocketed the proceeds of the sale of the concrete pumps and related equipment, without the trustee's consent, in direct violation of the Bankruptcy Court's order.

Rather than comply with the District Court's order, however, Petitioner moved for a stay and rehearing. In his motion, Petitioner revealed for the first time that the proceeds were no longer being held in a brokerage account, but instead had been used to pay counsel to pursue his ninth petition for writ of certiorari to this Court – to determine the Liquidating Trust's liability for the payment of income taxes. On June 25, 1991, the District Court denied the motion. On appeal the Eleventh Circuit, without opinion, affirmed *per curiam*. After a suggestion for rehearing *en banc* and motion for stay of

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[15] Although the District Court noted that Petitioner exhibited his contempt in the presence of the Bankruptcy Court by announcing his intention to disobey the Bankruptcy Court's order, the District Court concluded that Petitioner should only be held "at this time" in civil contempt.

mandate were denied, Petitioner came to this Court seeking review for the tenth time.

ARGUMENTS AGAINST GRANTING THE WRIT

Through the commencement of more than sixty appeals from Bankruptcy Court and District Court orders and nine petitions for writ of certiorari, the Petitioner, over the past seven years, has consistently ignored prior rulings and has attempted to systematically dismantle the confirmed and substantially consummated Plan. This petition is no different.

By defiantly disobeying the Bankruptcy Court and the District Court's orders, Petitioner again seeks to collaterally appeal the validity of the Plan, a matter conclusively decided more than four years ago when this Court denied the Petitioner's and the affiliated debtors' petition for writ of certiorari. *Miami Center Ltd. Partnership v. Bank of New York*, 488 U.S. 823 (1988). This Court also has conclusively decided what Petitioner deems the Liquidating Trust's "unlawful and fraudulent scheme" to avoid taxes. *Holywell Corp. v. Smith*, ___ U.S.___; 112 S.Ct. 1021 (1992). Thus, even a brilliant and cunning act of legal legerdemain cannot resurrect these settled matters.[16]

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[16] In denying Petitioner's motion for stay and rehearing the District Court recognized Petitioner's strategy to have the Court collaterally review the reorganization Plan:

> Mr. Gould argues that if the Supreme Court reverses the Eleventh Circuit's determination that the Trust is not responsible for the claimed taxes, and if Mr.

Because Petitioner has conceded that the concrete pumps and equipment were assets of the Liquidating Trust and that he refused to comply with the Bankruptcy Court and District Court orders directing him to turn over the proceeds, there are but two issues for this Court to review: (1) whether the Petitioner was properly found in contempt, and (2) whether sanctions were properly imposed. Obviously, these are fact-intensive matters not worthy of this Court's consideration.[17]

> Gould then brings an action for breach of fiduciary duty against the Liquidating Trustee for not paying those taxes, and if Mr. Gould then obtains a judgment against the Liquidating Trustee, and if that judgment includes as damages Mr. Gould's attorney's fees in appealing the tax decision, then perhaps he could not be held in contempt for diverting trust proceeds and using the asserts (sic) for his own purposes. Mr. Gould's argument is speculative and hypothetical. Moreover, even if he should prevail as to the tax matter, the underlying realities of the instant action remain the same: Mr. Gould sold a Trust asset, kept the proceeds, and took such action without the consent of the Liquidating Trustee and in direct violation of a court order. It is for these things that he was found in *civil* contempt of court and directed to comply.

(32a-33a.)

[17] In a feeble attempt to increase his chances of having review granted, Petitioner has sought to manufacture a "conflict" within the Circuit Courts of Appeals by stating that the Eleventh Circuit's affirmance of the contempt order is in conflict with *Donovan v. Mazzola*, 761 F.2d 1411, 1417 (9th Cir. 1985), a Ninth Circuit decision which holds that present inability to comply with a court order is a complete defense to civil contempt. To the contrary, there is no conflict as the Eleventh Circuit has adhered to *United States v. Rylander*, 460 U.S. 752, 757,

I.

THE BANKRUPTCY COURT AND DISTRICT COURT PROPERLY FOUND THE PETITIONER IN CIVIL CONTEMPT

It is well established that all orders of a court must be complied with promptly and if a person to whom the court directs an order believes that it is incorrect, the remedy is to appeal. *Maness v. Meyers*, 419 U.S. 449, 458 (1975). Absent a stay, a court's order must be complied with pending appeal. *Id.* Moreover, the inherent power of the courts to punish contempt of their authority and to coerce compliance is not disputed. *Ex parte Terry*, 128 U.S. 289 (1888). Thus, one who makes a private determination of the law and refuses to obey an order generally risks contempt even if the order is ultimately ruled incorrect. *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922).

These decisions teach that Petitioner had the right to present his case to the Bankruptcy Court and to appeal, as he deemed appropriate, from an adverse ruling. Once the Bankruptcy Court made its determination, Petitioner had to abide and comply with the order and, absent a stay, was required to turn over the cash proceeds. The

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reh'g denied, 462 U.S. 1112 (1983), which holds that inability to comply with a court's order is a complete defense to civil contempt. *Newman v. Graddick*, 740 F.2d 1513, 1525 (11th Cir. 1984). Moreover, this case does not involve an inability to comply with the Bankruptcy Court and the District Court's orders. Petitioner has deliberately refused to obey the lower court's authority in the hopes that this Court would review the validity of the Plan.

Petitioner, however, chose not only to ignore the Bankruptcy Court and District Court's orders, but also demonstrated complete disdain for their authority by simply pocketing the proceeds.

Against this background, the Bankruptcy Court and the District Court's actions were clearly proper. The orderly and expeditious administration of justice requires finality of judicial decrees and orders. Granting certiorari to review such a trivial matter would send a wrong message to all civil litigants disgruntled by an adverse ruling.

As the Honorable John Brown, former Chief Judge of the Court of Appeals for the Fifth Circuit once explained: "People simply cannot have the luxury of knowing that they have a right to contest the correctness of the judge's order in deciding whether to willfully disobey it . . . Court orders have to be obeyed until they are reversed or set aside in an orderly fashion." *United States v. Dickerson*, 465 F.2d 496, 509 (5th Cir. 1972) (quoting *Southern Ry. Co. v. Lanham*, 408 F.2d 348, 350 (5th Cir. 1969), *cert. denied*, 414 U.S. 979 (1973)).

II.

THE BANKRUPTCY COURT AND DISTRICT COURT PROPERLY IMPOSED SANCTIONS

Sanctions for civil contempt may be imposed to coerce obedience with a court order, or to compensate the party pursuing the contempt action for injuries resulting from the contemptuous behavior, or both. *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947). In determining how large a coercive sanction should be, the court

should consider the "character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction." *Id.* at 304.

Given the facts, the Bankruptcy Court and the District Court's imposition of monetary sanctions was neither an abuse of discretion, nor inappropriate, as both Courts sought to coerce Petitioner's compliance with their orders. Although Petitioner contends that a fine of $1,000 for each day of noncompliance violated the "excessive fines" clause of the Eighth Amendment, that Constitutional provision is not applicable in this situation.

The Eighth Amendment addresses bail, fines, and punishment,[18] and this Court has long "understood it to apply primarily, and perhaps exclusively to criminal prosecutions and punishments." *Browning-Ferris Indust. v. Kelco Disposal, Inc.*, 492 U.S. 257, 262 (1989).[19] Consequently, the Eighth Amendment is not implicated when sanctions are imposed for civil contempt since sanctions are a civil remedy designed for the benefit of other parties to secure compliance with court orders. *Uphaus v.*

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[18] The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[19] This Court has had no difficulty finding the Eighth Amendment inapplicable to claims outside the criminal process. *Browning-Ferris*, 492 U.S. at 264 (excessive fines clause inapplicable to awards of punitive damages in cases between private parties); *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (Eighth Amendment inapplicable to disciplinary corporal punishment in public schools); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (Eighth Amendment inapplicable to deportation of aliens because "deportation is not a punishment for crime").

Wyman, 360 U.S. 72, 81 (1959). *See Ingraham v. Wright*, 430 U.S. 651, 668 (1977); *United States v. City of Yonkers*, 856 F.2d 444, 459 (1988), *rev'd on other grounds sub nom. Spallone v. United States*, 493 U.S. 265 (1989) (excessive fines clause inapplicable to civil contempt sanctions imposed to secure prospective compliance with judicial decree); *United States v. Dien*, 598 F.2d 743, 745 (2d Cir. 1979).

Even if the "excessive fines" clause is assumed applicable in this context, a fine of $1,000 per day of noncompliance cannot be considered "excessive." This is especially true when one considers that Petitioner not only flagrantly disobeyed the lower courts' orders, but has abused the administration of justice by clogging the federal dockets with frivolous appeals.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petitioner's petition for writ of certiorari.

Respectfully submitted,

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